

04

# WAR CRIMES ACT OF 1995

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Y 4. J 89/1:104/81

War Crimes Act of 1995, Ser. No. 81...

**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON  
IMMIGRATION AND CLAIMS  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

**H.R. 2587**

WAR CRIMES ACT OF 1995

JUNE 12, 1996

**Serial No. 81**



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

27-100 CC

WASHINGTON : 1996

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For sale by the U.S. Government Printing Office  
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402  
ISBN 0-16-053593-X



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# CONTENTS

## HEARING DATE

June 12, 1996 .....	Page 1
---------------------	-----------

## TEXT OF BILL

H.R. 2587 .....	3
-----------------	---

## OPENING STATEMENT

Smith, Hon. Lamar, a Representative in Congress from the State of Texas, and chairman, Subcommittee on Immigration and Claims .....	1
--	---

## WITNESSES

Cronin, Capt. Michael P., chairman, Legislative Affairs Committee, Allied Pilots Association .....	7
Everett, Hon. Robinson O., professor of law, Duke University School of Law, and Senior Judge, U.S. Court of Military Appeals for the Armed Forces .....	20
Leigh, Monroe, partner, Steptoe & Johnson, former Assistant General Coun- sel for International Affairs, Department of Defense, and chairman, Amer- ican Bar Association Task Force on War Crimes in Yugoslavia .....	24
Matheson, Michael J., Principal Deputy Legal Adviser, Department of State ...	8
McNeill, John H., Senior Deputy General Counsel (International Affairs and Intelligence), Office of General Counsel, Department of Defense .....	13
Zaid, Mark S., law office of Mark S. Zaid, vice chair, International Criminal Law Committee, Section of Criminal Justice, American Bar Association, and chair, American Bar Association Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals .....	30

## LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Cronin, Capt. Michael P., chairman, Legislative Affairs Committee, Allied Pilots Association: Prepared statement .....	7
Everett, Hon. Robinson O., professor of law, Duke University School of Law, and Senior Judge, U.S. Court of Military Appeals for the Armed Forces: Prepared statement .....	22
Jones, Hon. Walter B., Jr., a Representative in Congress from the State of North Carolina: Prepared statement .....	6
Leigh, Monroe, partner, Steptoe & Johnson, former Assistant General Coun- sel for International Affairs, Department of Defense, and chairman, Amer- ican Bar Association Task Force on War Crimes in Yugoslavia: Letter dated June 7, 1955, to U.S. Senator Walter F. George, from Assist- ant Attorney General J. Lee Rankin .....	26
Prepared statement .....	28
Matheson, Michael J., Principal Deputy Legal Adviser, Department of State: Prepared statement .....	11
McCollum, Hon. Bill, a Representative in Congress from the State of Florida: Letter dated July 15, 1996, from Barbara Larkin, Acting Assistant Sec- retary for Legislative Affairs, Department of State .....	46
McNeill, John H., Senior Deputy General Counsel (International Affairs and Intelligence), Office of General Counsel, Department of Defense: Prepared statement .....	15

# IV

	Page
Zaid, Mark S., law office of Mark S. Zaid, vice chair, International Criminal Law Committee, Section of Criminal Justice, American Bar Association, and chair, American Bar Association Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals: Prepared statement .....	32

## APPENDIXES

Appendix 1.—Letter dated June 17, 1996, from Judge Robinson O. Everett, U.S. Court of Appeals for the Armed Forces .....	49
Appendix 2.—Statement of International Committee of the Red Cross .....	51
Appendix 3.—Statement of Alfred P. Rubin, distinguished professor of international law, the Fletcher School of Law and Diplomacy, Tufts University ..	53

# WAR CRIMES ACT OF 1995

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WEDNESDAY, JUNE 12, 1995

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON IMMIGRATION AND CLAIMS,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 3:17 p.m., in room 2237, Rayburn House Office Building, Hon. Lamar Smith (chairman of the subcommittee) presiding.

Present: Representatives Lamar Smith, Carlos J. Moorhead, and Bill McCollum.

Also present: Representative Walter B. Jones, Jr.

Staff present: Cordia A. Strom, chief counsel; George Fishman, assistant counsel; Judy Knott, secretary; and Marie McGlone, minority counsel.

## OPENING STATEMENT OF CHAIRMAN SMITH

Mr. SMITH. The Subcommittee on Immigration and Claims will come to order.

I've already made some initial remarks, but let me read an opening statement and then we'll proceed as quickly as possible.

Today's hearing is on H.R. 2587, the War Crimes Act of 1995, which was introduced by my colleague, Walter Jones, who is in front of me at the table. The Geneva Conventions for the protection of victims of war were written by the International Committee of the Red Cross following the Second World War. In 1955, Deputy Under Secretary of State Robert Murphy testified to the Senate that, "The Geneva Conventions are another long step forward toward mitigating the severities of war on its helpless victims. They reflect enlightened practices as carried out by the United States and other civilized countries, and they represent largely what the United States would do, whether or not a party to the Conventions. Our own conduct has served to establish higher standards, and we could only benefit by having them incorporated in a stronger body of wartime law."

Those words are as true today—or they should be as true today—as they were when they were uttered 40 years ago. While the United States ratified the Geneva Conventions in 1955, we have never passed the implementing legislation contemplated by the Conventions. The Conventions state that signatory countries are to enact penal legislation punishing what are called grave breaches: actions such as the deliberate killing of prisoners of war, the subjecting of prisoners to biological experiments, the willful infliction of great suffering or serious injury on civilians in occupied territory.

While offenses considered grave breaches can in certain instances be prosecutable under Federal law, there are a great number of instances in which no prosecution is possible today. Such non-prosecutable crimes might include situations where American prisoners of war are killed or forced to serve in the army of their captors or where American doctors on missions of mercy in foreign war zones are kidnapped or murdered. War crimes are not a thing of the past, and Americans can all too easily fall victim to them.

H.R. 2587 is designed to implement the Geneva Conventions and to protect Americans. It would add a provision to title 18 of the U.S. Code providing that whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions where the victim of such breach is a member of the Armed Forces of the United States or a citizen of the United States shall be fined or imprisoned or both, and if death results to the victim, shall also be subject to the penalty of death.

The administration shares my support for this legislation. However, the State Department and Defense Department have proposed that we amend the legislation, primarily by expanding its jurisdiction to cover war crimes wherever they occur, regardless of the nationality of the perpetrator or victim, as long as the perpetrator is found in the United States. This is called universal jurisdiction.

Universal jurisdiction is not unknown to American criminal law. For instance, 18 U.S.C. 2340(a), which criminalizes torture, can be utilized whenever an alleged torturer is found in the United States regardless of the nationality of the perpetrator, the victim, or the site of the offense. However, granting universal jurisdiction is a huge step to take with possibly troubling foreign policy implications. Will it enmesh us in conflicts around the world in which we have no interest? Will it encourage states like Libya or Iran to assert universal jurisdiction against Americans for imagined war crimes? On the other hand, are there crimes so heinous and universally condemned that it is every nation's duty to prosecute their perpetrators? These are the issues which we will address today.

[The bill, H.R. 2587, follows:]



104TH CONGRESS  
1ST SESSION

# H. R. 2587

To carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.

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## IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 7, 1995

Mr. JONES introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “War Crimes Act of  
5 1995”.

### 6 **SEC. 2. CRIMINAL PENALTIES FOR CERTAIN WAR CRIMES.**

7 (a) IN GENERAL.—Title 18, United States Code, is  
8 amended by inserting after chapter 117 the following:

1                   **“CHAPTER 118—WAR CRIMES**

“Sec.

“2401. War crimes.

2   **“§ 2401. War crimes**

3           “(a) IN GENERAL.—Whoever, whether inside or out-  
4 side the United States, commits a grave breach of the Ge-  
5 neva conventions where the victim of such breach is mem-  
6 ber of the armed forces of the United States or a citizen  
7 of the United States, shall be fined under this title or im-  
8 prisoned for life or any term or years, or both, and if death  
9 results to the victim, shall also be subject to the penalty  
10 of death.

11          “(b) DEFINITIONS.—As used in this section, the term  
12 ‘grave breach of the Geneva conventions’ means conduct  
13 defined as a grave breach in any of the international con-  
14 ventions relating to the laws of warfare signed at Geneva  
15 12 August 1949 or any protocol to any such convention,  
16 to which the United States is a party.”

17          (b) CLERICAL AMENDMENT.—The table of chapters  
18 for part I of title 18, United States Code, is amended by  
19 inserting after the item relating to chapter 117 the follow-  
20 ing new item:

“118. War crimes ..... 2401”.



Mr. SMITH. We have two distinguished panels of witnesses, but before we hear from them or any member of the subcommittee for an opening statement, I'd like to recognize the individual who is responsible for this legislation, for our hearing today, and that's my friend and colleague, Walter Jones. And, in addition to his statement, Walter, we welcome you to introduce who is with you and have him recognized as well.

So please proceed.

Mr. JONES. Thank you, Mr. Chairman. Mr. Chairman and Mr. Moorhead, thank you for this opportunity to speak before the House Subcommittee on Immigration. I'm here to speak in strong support of the War Crimes Act of 1995.

The bill is simple and straightforward. Presently, in the absence of an international criminal tribunal or a military commission, we have no means by which we can try and prosecute individuals who have committed a war crime against an American citizen. This legislation before you today will give the United States the legal authority to prosecute individuals who have committed a war crime against an American citizen. The bill restores justice by filling the gaps in Federal criminal law relating to the prosecution of individuals for grave breaches of the Geneva Convention. When passed, the United States will no longer be a safe haven for anyone having committed such crimes.

The bill before the subcommittee is particularly important to the men and women in the armed services. As a member of the House National Security Committee, I was astonished to learn that currently there is no law that provides the means for prosecuting unspeakable crimes committed by foreign nationals against U.S. service personnel. While the Geneva Convention of 1949 provides the United States with the authority, we have not yet passed legislation to provide the courts with the enforcement mechanism. This gap in the Federal law is unacceptable. We call upon our men and women in uniform to serve in hostile lands now more than ever. The specter of war crimes looms over almost every U.S. military action abroad, whether peacekeeping in Somalia as part of a United Nations force or peacemaking in Bosnia under a NATO command. No guarantees exist for U.S. service personnel that they will not be the victim of a grave breach of the Geneva Convention.

Anyone who believes this legislation is unnecessary should recall the horror of the American Blackhawk pilot as he was taken prisoner in Mogadishu after his helicopter was shot down. For that matter, consider the American men and women taken prisoners by Iraq during the Gulf War.

As Americans, we have a long and cherished sense of justice. From that, we have built a judicial system that most people believe is the finest in the world. No matter where or when an atrocity may occur against an American citizen, our Federal prosecutors should be empowered to track down and try any known violators of the Geneva Convention.

With us today is the gentleman who came to me with the idea for this bill. Capt. Mike Cronin served in Vietnam as an A-6 pilot. After being shot down, he spent 6 years living in a cage at the Hanoi Hilton as a prisoner of war. When he returned to the States, he earned his law degree at Georgetown University. He has since

become an airline pilot and the legislative affairs chairman for the Allied Pilots Association. I am very pleased he can be with us today. The sacrifices he has made for his Nation and his efforts on this legislation should be applauded.

Mike, it is for you and for future victims of war crimes that I hope we are able to pass this bill.

Chairman Smith and members of the subcommittee, thank you for the opportunity to speak on behalf of what I believe to be important and long-overdue legislation. I look forward to the testimony of this panel before us.

[The prepared statement of Mr. Jones follows:]

PREPARED STATEMENT OF HON. WALTER B. JONES, JR., A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman and Mr. Moorhead, thank you for this opportunity to speak before the House Subcommittee on Immigration. I am here to speak in strong support of the War Crimes Act of 1995.

The bill is simple and straightforward. Presently, in the absence of an international criminal tribunal or a military commission, we have *no* means by which we can try and prosecute individuals who have committed a war crime against an American citizen.

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We call upon our men and women in uniform to serve in hostile lands now more than ever. The specter of war crimes looms over almost every U.S. military action abroad—whether peacekeeping in Somalia as part of a United Nations force or peacemaking in Bosnia under a NATO command. No guarantees exist for U.S. service personnel that they will not be the victim of a “grave breach” of the Geneva Convention.

Anyone who believes this legislation is unnecessary should recall the horror of the American Blackhawk pilot as he was taken prisoner in Mogadishu after his helicopter was shot down. For that matter, consider the American men and women taken prisoners by Iraq during the Gulf War.

As Americans, we have a long and cherished sense of justice. From that, we have built a judicial system, that most people believe is the finest in the world. No matter where or when an atrocity may occur against an American citizen, our Federal Prosecutors should be empowered to track down and try any known violators of the Geneva Convention.

With us today is the gentleman who came to me with the idea for this bill. Captain Mike Cronin served in Vietnam as an A-6 pilot. After being shot down, he spent six years living in a cage at the “Hanoi Hilton” as a prisoner of war. When he returned to the states, he earned his law degree at Georgetown University.

He has since become an airline pilot and the Legislative Affairs Chairman for the Allied Pilots Association. I am very pleased he can be with us today. The sacrifices he has made for this nation, and his efforts on this legislation should be applauded. Mike, it is for you, and for future victims of war crimes, that I hope we are able to pass this bill.

Chairman Smith, and members of this Subcommittee, thank you for the opportunity to speak on behalf of what I believe to be important and long overdue legislation. I look forward to the testimony of the panel before us.

Mr. JONES. Mr. Chairman, at this time, with your permission, I would like to introduce Capt. Mike Cronin. Captain Cronin.

Mr. SMITH. Captain Cronin, we welcome you as well. And before you proceed, I just want to say how much we appreciate the sacrifices you've made for our country and the service that you have given to our country, going back many, many years. I hope you never have to endure that kind of hardship again, but it is appreciated, and we'd welcome your remarks now.

**STATEMENT OF CAPT. MICHAEL P. CRONIN, CHAIRMAN, LEGISLATIVE AFFAIRS COMMITTEE, ALLIED PILOTS ASSOCIATION**

Captain CRONIN. Thank you, Mr. Chairman, members of the committee. I'm very pleased to be here, and thank you for giving me the opportunity to say a few words.

First of all, I would like to express my gratitude to Congressman Jones for being willing to listen to a guy with an idea. He was not the first one who heard my idea, but he was the first person willing to act upon it, and for that I will always be grateful.

I believe this is important legislation and I have personal experience to bear this out. Our opponents in the field have consistently denied Americans the benefits of the Geneva Conventions, and since World War II they have done so with impunity. This legislation can change that.

The nations of the world revised the Geneva Conventions in 1949 to make them more enforceable, based on the bitter experience of World War II. Unless the signatories pass appropriate legislation, this goal cannot be achieved. Many other nations have already passed appropriate laws, and I hope that we shall join them.

War is an extraordinary event. It defies rationality and ordinary laws. The worst effects of war can be ameliorated only by the laws of war, which are themselves extraordinary and can be enforced only by extraordinary means such as this bill.

I thank the committee very much for its consideration of this bill, and I look forward to assisting in your deliberations to any extent that I can. Thank you very much, sir.

[The prepared statement of Captain Cronin follows:]

**PREPARED STATEMENT OF CAPT. MICHAEL P. CRONIN, CHAIRMAN, LEGISLATIVE AFFAIRS COMMITTEE, ALLIED PILOTS ASSOCIATION**

Good afternoon Chairman Smith, members of the Committee.

I am Michael P. Cronin. I thank you for allowing me to address the Committee.

I would like to express my gratitude to Congressman Walter Jones for being willing to listen. His very determined efforts have converted a legal theory into an important bill which has a real possibility of becoming law.

I believe this is very important legislation. My personal experience in Vietnam convinces me that this is so.

Our opponents in the field have consistently denied Americans the benefits of the Geneva Conventions. Since the end of World War II, they have done so with impunity. This legislation can change that.

The nations of the world revised the Geneva Conventions in 1949 with the specific intent of making them more enforceable. They were motivated to do this by the bitter experience of World War II.

Unless the signatories to the Conventions enact appropriate legislation, this goal of enforceability won't be realized. Many other nations have already acted and I hope we will join them.

War is an extraordinary event. It defies rationality and ordinary laws. The worst effects of war can be ameliorated only by the laws of war, which are themselves extraordinary. They can be enforced only by extraordinary means such as this bill.

I thank the Committee for its interest in this important issue. I will follow your deliberations with the greatest interest.

Thank you.

Mr. SMITH. Thank you, Captain Cronin.

You mentioned that you were just a man with an idea and you approached Congressman Jones, and he responded and acted. I just was going to tell you that he actually did more than that. Every time he saw me on the House floor he would grab me by the lapel and remind me about this bill. We probably had at least three or four meetings on this in various offices around the Capitol. I won't say it got to the point where I avoided trying to make eye contact with him on the House floor, but it was right before that, and it is his tenacity and persistence, as you said, along with your good idea, that has gotten us to the point we are today.

Walter, you're welcome, if you would join us up here, if you'd like to, and—

Mr. JONES. Thank you. Mr. Chairman, I'm going to go to the floor for about 10 minutes, and then I will be back. I do want to hear the panelists that will be speaking. So I will return in about 10 or 15 minutes, and I thank you for that offer.

Mr. SMITH. OK. We'll look forward to your participation.

Captain Cronin, if you don't mind, we're going to welcome the first panel, and I'm delighted you're going to be here the whole time of the hearing.

Captain CRONIN. Thank you very much.

Mr. SMITH. Let me say also that we have just been joined by Congressman Bill McCollum of Florida, and appreciate his interest in the subject and his attendance as well. We have to have two members here, as I mentioned a while ago. So he is now the indispensable person, at least to keep us going here. [Laughter.]

I'm pleased to introduce the first panel. Michael Matheson is Principal Deputy Legal Adviser at the State Department, and John H. McNeill is Senior Deputy General Counsel for International Affairs and Intelligence at the Defense Department.

We welcome you and look forward to your testimony. And while we have a 5-minute limit, you're welcome to use all the time or just summarize your testimony, whatever suits your purposes.

We'll start with Mr. Matheson.

#### **STATEMENT OF MICHAEL J. MATHESON, PRINCIPAL DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE**

Mr. MATHESON. Thank you, Mr. Chairman. I would like to do what you suggest and submit my prepared testimony in full for the record and give you a somewhat shorter presentation.

Mr. SMITH. OK. Without objection, your whole testimony will be made a part of the record.

Mr. MATHESON. We are very pleased to participate today in this hearing on H.R. 2587. This bill, in our view, would serve important goals: to help deter war crimes against U.S. nationals and members of U.S. Armed Forces and to ensure that the United States is able to comply fully with its international law obligations with respect

to the prosecution of war crimes. The administration fully supports both of these goals.

As you know, the United States has played a leading role in international efforts to bring to justice those who have committed war crimes and other violations of international humanitarian law. This is one of the reasons why the United States has so strongly supported the establishment and the work of the U.N. War Crime Tribunals for Yugoslavia and Rwanda.

The Congress acted in support of this objective earlier this year by its adoption of legislation that authorized the surrender to these tribunals of persons found in the United States who had been indicated or convicted for offenses that were within the jurisdiction of the tribunals. However, we do not believe that the prosecution of war crimes can be left to international tribunals alone. The mandate of these tribunals is typically limited to particular conflicts, and as a practical matter, the tribunals will not have the ability to deal with most offenders even in those cases.

But even more fundamentally, international law imposes an obligation on individual states to take various measures to prevent and punish the commission of war crimes. In particular, as we have already heard, the parties to the 1949 Geneva Conventions are required to enact any legislation necessary to provide effective penal sanctions for persons committing any of the grave breaches that are defined in the Conventions.

At the time of the submission of the Conventions to the Senate for their advice and consent, the executive branch advised that implementing legislation was not required since offenders could be prosecuted under Federal and State penal statutes in the case of crimes within U.S. jurisdiction or the Uniform Code of Military Justice with respect to crimes committed abroad. However, over the years U.S. courts have handed down a series of decisions which cast doubt on the constitutionality of the exercise by military tribunals of criminal jurisdiction over the acts abroad of various categories of persons who are not in active military service. And therefore, it is very useful, in our view, to establish clear jurisdiction in U.S. courts to try any persons for such offenses if they come within our jurisdiction.

Now, as currently drafted, H.R. 2587 would create new provisions in title 18 of the U.S. Code that would make it a criminal offense for any person to commit a grave breach of the 1949 Conventions, or any protocol thereto to which the United States is a party, against a citizen of the United States or a member of the Armed Forces of the United States. Although, of course, we hope that such acts are never committed against our nationals or our armed forces members, experience has taught us otherwise. And the administration certainly supports the enactment of criminal legislation to deal with cases where our nationals or Armed Forces personnel are the victims of such crimes.

However, if we are to achieve fully the objectives to which I referred, we believe that the bill should be expanded in several important respects. First, we believe it should be amended to expand the circumstances under which the commission of the crimes in question would be subject to the criminal jurisdiction of U.S. courts. Specifically, we believe that the provision should apply not

only where offenses are committed against a U.S. national or a member of U.S. Armed Forces, but also where offenses are committed by such persons. We are certainly interested in bringing to justice those who commit war crimes against our nationals and our armed forces personnel, but we also have an interest in having the authority, if necessary, to prosecute any U.S. national or armed service member who commits such acts.

Further, we believe that the bill should be expanded to provide criminal jurisdiction whenever the offense is committed in the United States or where the perpetrator of the offense is later found in the United States, regardless of where or against whom it was committed. This follows a pattern adopted in the U.S. Criminal Code for offenses implicating other international obligations, such as piracy, attacks on internationally-protected persons, and attacks against international civil aviation.

Second, the administration supports expanding the types of violations of international humanitarian law to be addressed by the bill. We suggest that the provision cover not only grave breaches of the 1949 Conventions, but also a more general category of war crimes that would be defined to include certain violations of the law of war in addition to grave breaches. Specifically, we believe that the bill should make it a crime under U.S. law to commit violations of the international rules that apply during noninternational armed conflicts: that is, civil wars and other internal conflicts. U.S. nationals and U.S. servicemen may well become the victims of war crimes in such conflicts, as in fact happened in El Salvador and Somalia.

We further believe that the bill should be expanded to cover violations of the relevant articles of the Hague Convention No. IV, which is an important source of international humanitarian law with respect to means and methods of warfare.

And finally, we have recently participated in the successful negotiation of an amendment to the International Protocol on Land Mines, and this Protocol will soon be submitted to the Senate for its advice and consent. It will require the imposition of penal sanctions against persons who willfully kill or cause serious injury to civilians by violation of the land mine provisions.

We believe that U.S. nationals and servicemen could certainly become the victims of the improper use of land mines, as did, indeed, happen in Vietnam, and therefore, we believe the bill should cover such violations as well.

Mr. SMITH. Mr. Matheson, I'm going to need to move on. We have your complete testimony for the record. So, if we could, either you can bring it to a conclusion or we can go on.

Mr. MATHESON. Fine. I would like to make just one more point—

Mr. SMITH. OK.

Mr. MATHESON. That you won't find in my prepared testimony, which is that we realize that it would not necessarily be appropriate or a good use of U.S. law enforcement resources to prosecute in U.S. courts all of the persons who might fall within the categories that I've been describing. We believe that in each case that there should be careful judgment exercised at a high level within the Justice Department to ensure that each prosecution is warranted, taking into account the seriousness of the offense, the cir-



cumstances, the interests of the United States in a particular case, and the availability of alternatives such as extradition.

And therefore, we have included in our proposed revision of the bill a provision stating that no prosecution should be undertaken unless the Attorney General or his designee determine in writing that such a prosecution would be in the public interest and necessary to secure substantial justice. We believe this would ensure against a flood of unnecessary cases while giving us the capability and the option to use this authority where we need to do it.

[The prepared statement of Mr. Matheson follows:]

PREPARED STATEMENT OF MICHAEL J. MATHESON, PRINCIPAL DEPUTY LEGAL  
ADVISER, DEPARTMENT OF STATE

Mr. Chairman, I am pleased to participate today in this hearing on H.R. 2587, entitled the "War Crimes Act of 1995." H.R. 2587 would serve important goals: to help deter war crimes against U.S. persons, and to ensure that the United States is able to comply fully with its international law obligations with respect to the prosecution of war crimes. The Administration fully supports these goals.

The United States has played a leading role in international efforts to bring to justice those who have committed war crimes and other violations of international humanitarian law. In his remarks on October 15, 1995, commemorating the 50th anniversary of the Nuremberg Tribunals, President Clinton declared: "We have an obligation to carry forward the lessons of Nuremberg." The President stressed the need to "put into practice the principle that those who violated universal human rights must be called to account for those actions." This is one of the reasons why the United States has so strongly supported the establishment and the work of the United Nations War Crimes Tribunals for the former Yugoslavia and for Rwanda. As President Clinton said with regard to persons indicted by those Tribunals:

Those accused of war crimes, crimes against humanity and genocide must be brought to justice. They must be tried and, if found guilty, they must be held accountable.

The Congress acted in support of this objective earlier this year by its adoption of Section 1342 of the National Defense Authorization Act, Fiscal Year 1996, which authorized the surrender to the War Crimes Tribunals of persons found in the United States who had been indicted or convicted for offenses within the jurisdiction of those Tribunals.

Although the United States led the effort to create the War Crimes Tribunals for the former Yugoslavia and for Rwanda, we do not believe that the prosecution of war crimes can be left to international tribunals alone. The mandate of these tribunals is limited to particular conflicts, and as a practical matter these tribunals will not have the ability to deal with most offenders even in those cases. More fundamentally, international law imposes an obligation on individual states to take various measures to prevent and punish the commission of war crimes.

Making such acts criminal under domestic law is essential to deterring them. When such acts do occur, prosecuting those who commit them is essential in helping to prevent their recurrence. If we are to ensure that those who commit war crimes are brought to justice, we must rely first and foremost on the domestic criminal laws and practice of individual states.

Indeed, international law expressly requires states to enact penal legislation, where necessary, to provide for the punishment of those who commit certain war crimes. Parties to the Geneva Conventions of August 12, 1949, relating to the laws of warfare ("the 1949 Geneva Conventions") are required to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" defined in those Conventions. Grave breaches include, among other things, acts such as willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to body or health, when committed against sick or wounded combatants, prisoners of war, or civilians.

At the time of the submission of the 1949 Geneva Conventions to the Senate for advice and consent, the Executive Branch advised that implementing legislation was not required, since offenders could be prosecuted under federal and state penal statutes (in the case of crimes within United States jurisdiction) or the Uniform Code of Military Justice (with respect to crimes committed abroad). However, over the years, U.S. courts have handed down a series of decisions which cast doubt on the

constitutionality of the exercise by military tribunals of criminal jurisdiction over the acts abroad of various categories of persons who are not in active military service.

It is therefore very useful, in our view, to establish clear jurisdiction in U.S. courts to try any persons for such offenses if they come within U.S. jurisdiction. Furthermore, since 1949 the United States has accepted certain specialized rules of international humanitarian law which may not have an equivalent in existing U.S. criminal statutes.

As currently drafted, H.R. 2587 would create new provisions in title 18 of the U.S. Code that would make it a criminal offense, prosecutable in U.S. courts, for any person to commit a grave breach of the 1949 Geneva Conventions, or any protocol thereto to which the United States is a party, against a citizen of the United States or a member of the armed forces of the United States. Although we of course hope that such acts are never committed against our nationals or armed forces personnel, experience has taught us otherwise, and the Department of State certainly supports the enactment of criminal legislation to deal with cases where our nationals or armed forces personnel are the victims of grave breaches of the 1949 Geneva Conventions.

If, however, we are to achieve the objectives to which I have referred, H.R. 2587 should be expanded in several important respects. First, it should be amended to expand the circumstances under which the commission of the crimes in question would be subject to the criminal jurisdiction of U.S. courts. Specifically:

The provision should apply not only where offenses are committed against a U.S. national or member of the U.S. armed forces, but also where offenses are committed by such persons. While we are certainly interested in bringing to justice those who commit war crimes against our nationals or armed service personnel, we also have an interest in punishing any U.S. national or armed service member who commits such acts.

Further, H.R. 2587 should be expanded to provide criminal jurisdiction whenever the offense is committed in the United States, or where the perpetrator of an offense is later found in the United States regardless of where or against whom it was committed. This would ensure the ability of the United States to fulfill our obligations under the 1949 Geneva Conventions and other international agreements. It will ensure that the United States cannot be a safe haven for those who have committed violations of the laws of war.

Second, the Administration supports expanding the types of violations of international humanitarian law to be addressed by H.R. 2587. We suggest that the provision cover not only grave breaches of the 1949 Geneva Conventions, but a more general category of "war crimes" that would be defined to include certain violations of the laws of war in addition to grave breaches. Specifically:

We believe H.R. 2587 should make it a crime under U.S. law to commit violations of the rules specified in Common Article 3 and Additional Protocol II to the 1949 Geneva Conventions that apply during non-international armed conflict, that is, civil wars and other internal conflicts. As the grim experience in Rwanda reminds us, some of the most horrible war crimes occur in internal armed conflicts, as to which the grave breach provisions of the 1949 Geneva Conventions may not be applicable.

For example, Common Article 3 of the Geneva Convention prohibits murder, cruel treatment, and torture of persons, such as civilians or captured or wounded combatants, taking no active part in hostilities during a non-international armed conflict. As evidence of the importance of the protections of international law in non-international armed conflicts, the United States has taken the position that the Statute of International Criminal Tribunal for the Former Yugoslavia, which gives the Tribunal jurisdiction over "persons violating the laws or customs of war," includes violations of Common Article 3 and the additional protocols to the Geneva Conventions. We believe that such violations should similarly be treated as war crimes for purposes of U.S. law, and thus should be covered by an expanded H.R. 2587.

Further, H.R. 2587 should be expanded to cover violations of Articles 23, 25, 27, and 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, of October 18, 1907, applicable to international armed conflict. The 1907 Hague Convention is an important source of international humanitarian law, and it served as an important basis of law for the Nuremberg Tribunal.

Article 23 of the Convention lists a series of acts prohibited in war, including, among other things, using poison weapons, killing individuals who have laid down their arms and surrendered, and employing arms calculated to cause unnecessary suffering. Article 25 prohibits the bombardment of undefended towns, villages, dwellings, or buildings. Article 27 requires forces to take steps to spare, as far as

possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. Article 28 prohibits pillage. Provisions such as these have provided the basis for Article 3 of the Statute of International Criminal Tribunal for the Former Yugoslavia, which gives the Tribunal jurisdiction over "persons violating the laws or customs of war."

The Administration believes such violations should also be treated as war crimes in H.R. 2587.

Finally, the United States has recently participated in the successful negotiation of an amendment to Protocol II (on land mines) to the Convention on Conventional Weapons, to which the United States is a Party. The amended Protocol, which will soon be submitted to the Senate for its advice and consent, will require the imposition of penal sanctions against persons who, in relation to armed conflict and contrary to the provisions of the Protocol, willfully kill or cause serious injury to civilians.

The United States should take care now, in H.R. 2587, to provide for making such offenses criminal under U.S. law when the amended Protocol comes into force for the United States. (We fully expect favorable Senate consideration, and hopefully entry into force, next year.) Doing so would ensure, for example, that deliberate, indiscriminate use of anti-personnel mines to harm civilians would constitute an offense under U.S. law. This objective is entirely consistent with Congressional sentiments and Administration policy on ending the humanitarian crisis posed by these weapons.

Expanding U.S. criminal jurisdiction over war crimes will serve not only the purpose of ensuring that the United States is able to comply fully with its obligations under international law, but will also serve as a diplomatic tool in urging other countries to do the same. Currently the U.S. Government's leverage in calling on other governments to enforce the laws of armed conflict is restricted because of the limitations I have noted concerning our own domestic enforcement jurisdiction. H.R. 2587, if amended in the manner we propose, would remedy this defect concerning U.S. enforcement of the laws of armed conflict, particularly with respect to persons who commit such crimes outside the United States but who enter U.S. territory. With this bill, if modified as we suggest, we will set the right example and use it to persuade other governments to abide by and enforce the laws of armed conflict.

Mr. Chairman, this concludes my prepared testimony. I have also submitted for the record the Administration's proposed revision of H.R. 2587 to expand the bill in the manner I have described. I thank you for the opportunity to appear before you and would be happy to answer any questions.

Mr. SMITH. Thank you.

Mr. McNeill.

# **STATEMENT OF JOHN H. McNEILL, SENIOR DEPUTY GENERAL COUNSEL (INTERNATIONAL AFFAIRS AND INTELLIGENCE), OFFICE OF GENERAL COUNSEL, DEPARTMENT OF DEFENSE**

Mr. McNEILL. Thank you, Mr. Chairman, Mr. McCollum. We also appreciate the opportunity to participate today in this hearing on H.R. 2587, the War Crimes Act of 1996. The Department of Defense fully supports the purposes of the bill and its goal of bringing U.S. criminal law into conformity with the international legal obligations of the United States with respect to the prosecution of war crimes.

Likewise, we also agree that the bill should be expanded to include violations of the laws and customs of war not reflected in the Geneva Conventions of 1949, including violations of articles 23, 25, 27, and 28 of the Annex to Hague Convention IV, as well as of Protocol II to the Conventional Weapons Convention, when that Protocol comes into force for the United States, as mentioned by Mr. Matheson.

We believe that violations of the laws governing the means and methods of warfare, which these provisions address, can be just as serious as grave breaches of the Geneva Conventions. We also

agree that the law should apply to any person who has committed a war crime and is subject to the jurisdiction of U.S. courts. We concur that the 1949 Geneva Conventions require states to enact penal legislation to provide for the punishment of those who commit certain war crimes, and that those Conventions require each party to search for persons alleged to have committed grave breaches and to bring such persons, regardless of their nationality, before its own courts.

The Armed Forces of the United States are subject to and governed by the Uniform Code of Military Justice, with which I know you are very familiar in this committee. Those subject to the UCMJ include members of the Armed Forces on active duty, reserve members on active duty or inactive duty training, members of the National Guard and Air National Guard on active duty or inactive duty training in Federal service, retired members receiving retired pay, and cadets, aviation cadets and midshipmen, to mention just a few who fall under the jurisdiction of the Code.

Violations of the laws and customs of war by these members during armed conflict ordinarily would be investigated and prosecuted as violations of the Uniform Code of Military Justice, and the accused members would be subject to trial and punishment by a court-martial. While charges and specifications against an accused normally would not specify that the accused is charged with a war crime per se, nevertheless, the accused would be prosecuted for crimes specified, for example, as grave breaches of the Geneva Conventions of 1949. Such violations could include murder, article 118 of the UCMJ, and rape, article 120 of the UCMJ, and other very serious crimes.

The military services have conducted courts-martial of accused who have allegedly committed war crimes in numerous instances where U.S. forces have been involved in hostilities. You may recall reading about certain courts-martial proceedings growing out of military operations in recent years in Panama and Somalia, where accused members of the U.S. Armed Forces were prosecuted for what might have amounted to grave breaches of the Geneva Conventions.

The Armed Forces of the United States train and operate in accordance with the laws and customs of war. Our Armed Forces have an important stake in adherence to these laws, not only to ensure deterrence, control, and discipline in our own ranks, Mr. Chairman, but also to encourage adherence to the laws and customs of war by our adversaries, the point I think that was made so eloquently by Mr. Jones and Captain Cronin.

Although the jurisdiction of the UCMJ extends to all active duty and other personnel who I have mentioned previously, there is one class of personnel to which the UCMJ does not extend; namely, the soldier, sailor, airman, or marine who has completed his or her tour of duty in the Armed Forces, has mustered out of the service, and has been discharged. Should that person have committed a war crime during his or her active duty tour, the military services do not have the authority to recall the accused to active duty for purposes of prosecution in a trial by court-martial. Likewise, prosecution under Federal or State law may be unavailing, especially if the crime were to have been committed during deployment of our

Armed Forces overseas. H.R. 2587, as modified by the administration's draft, is designed, among other things, to fill this lacuna in the law, and would ensure that such individuals could be prosecuted and brought to justice for violations of the laws and customs of war during their service on active duty.

Mr. Chairman, once again, I would like to express the Department's support of the purposes and objectives of H.R. 2587 and our belief that the bill can be improved and made more comprehensive by the modifications suggested by the administration. We appreciate the opportunity to appear before you and provide the Department's views. And certainly I would be pleased to address any questions that you or other members of the subcommittee may have.

Thank you.

[The prepared statement of Mr. McNeill follows:]

PREPARED STATEMENT OF JOHN H. MCNEILL, SENIOR DEPUTY GENERAL COUNSEL  
(INTERNATIONAL AFFAIRS AND INTELLIGENCE), OFFICE OF GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. Chairman, we also appreciate the opportunity to participate today in this hearing on H.R. 2587, entitled the "War Crimes Act of 1996." We fully support the purposes of the bill and its goal of bringing the United States criminal law into conformity with the international legal obligations of the United States with respect to the prosecution of war crimes. Likewise, we also agree that the bill should be expanded to include violations of the laws and customs of war not reflected in the Geneva Conventions of 1949, to include violations of Articles 23, 25, 27 and 28 of the Annex to Hague Convention IV, and of Protocol II to the Conventional Weapons Convention when that Protocol comes into force. We believe that violations of the laws governing the "means and methods of warfare," which these provisions address, can be just as serious as "grave breaches" of the Geneva Conventions.

We also agree that the law should apply to any person who has committed a war crime who comes within the jurisdiction of United States courts. We concur that the 1949 Geneva Conventions require states to enact penal legislation to provide for the punishment of those who commit certain war crimes, and that those Conventions require each Party to "search for persons alleged to have committed . . . grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts."

The Armed Forces of the United States are subject to and governed by the Uniform Code of Military Justice (UCMJ) (10 U.S.C., Chapter 47). Those subject to the UCMJ include members of the Armed Forces on active duty, reserve members on active duty or inactive-duty training, members of the National Guard and Air National Guard on active duty or inactive-duty training in Federal service, retired members receiving retired pay, and cadets, aviation cadets and midshipmen, to mention just a few who fall under the jurisdiction of the Code. Violations of the laws and customs of war by these members during armed conflict ordinarily would be investigated and prosecuted as violations of the Uniform Code of Military Justice, and the accused members would be subject to trial and punishment by a court-martial. While charges and specifications against an accused normally would not specify that the accused is charged with a "war crime," nevertheless, the accused would be prosecuted for crimes specified, for example, as "grave breaches" of the Geneva Conventions of 1949. Such violations could include murder (Article 118, UCMJ), rape (Article 120, UCMJ), waste, destruction or spoilage of non-U.S. Government property (Article 109, UCMJ), or extortion (Article 127, UCMJ).

The military services have conducted courts-martial of accused who have allegedly committed war crimes in numerous instances where U.S. Forces have been involved in hostilities. You may recall reading about certain courts-martial proceedings growing out of military operations in Panama and Somalia, where accused members of the U.S. Armed Forces were prosecuted for what amounted to "grave breaches" of the Geneva Conventions. The Armed Forces of the United States train and operate in accordance with the laws and customs of war; they have an important stake in adherence to these laws, not only to ensure deterrence, control and discipline among our own Armed Forces, but also to encourage adherence to the laws and customs of war by our adversaries.

Although the jurisdiction of the UCMJ extends to all active duty and other personnel who I have mentioned previously, there is one class of persons to which the UCMJ does not extend. This class includes the soldier or sailor who has completed his or her tour of duty in the Armed Forces and has "mustered out" of the service and has been discharged. Should that person have committed a war crime during his or her tour of active duty, the military services do not have the authority to recall the accused to active duty for purposes of prosecution in a trial by court-martial. Likewise, prosecution under Federal or state law may be unavailing, especially if the crime were to have been committed during deployment of the Armed Forces overseas. H.R. 2587, as modified by the Administration's draft, is designed, among other things, to fill this lacuna in the law, and would ensure that these individuals could be prosecuted and brought to justice for violations of the laws and customs of war during their service on active duty.

Once again I would like to express the Department's support of the purposes and objectives of H.R. 2587, and our belief that the bill can be improved and made more comprehensive by the modifications suggested by the Administration. Mr. Chairman, this concludes my prepared testimony to the subcommittee. We appreciate the opportunity to appear before you and provide the Defense Department's views on H.R. 2587. I would be pleased to address any questions that you may have.

Mr. SMITH. Thank you, Mr. McNeill.

Let me direct my first question to Mr. Matheson. The United States is a strong supporter of the International Criminal Tribunal for the former Yugoslavia, which was established by the U.N. Security Council to prosecute war criminals from the Yugoslavian civil war. Are such international tribunals more appropriate venues for dealing with war crimes than domestic criminal courts?

Mr. MATHESON. No. I think even in the case of the Yugoslav Tribunal, it is not an exclusive forum for war crimes against—in that situation. They have a statute which reaffirms that there is concurrent jurisdiction both by the Tribunal and by domestic courts. That is essential because the Tribunal will only be able to try a small fraction of the persons who have committed war crimes, and this is even more true for the Rwanda Tribunal where there were literally tens of thousands of individuals who committed serious war crimes.

So it will always be the case that domestic courts will have a big burden to bear, even——

Mr. SMITH. So it's primarily because of the numbers then that it's——

Mr. MATHESON. Partially because of the numbers, partially because of access to the individuals, and partially because tribunals will probably only be created in a relatively small number of cases, as you can already see is the case now.

Mr. SMITH. Do you have any worry that enactment of H.R. 2587 would encourage rogue nations—for instance, Libya or Iran—to seize Americans and prosecute them for so-called war crimes?

Mr. MATHESON. No. If they want to do that, they'll do that now. I don't think that these countries base their decisions on what U.S. laws are enacted. And, furthermore, it is already the case that the 1949 Conventions, and international law generally, recognize war crimes as what you have called universal-jurisdiction crimes, which one may prosecute when an individual comes within one's jurisdiction. So nothing we would do in this bill would expand any already-accepted notion.

Mr. SMITH. Have Libya or Iran seized any Americans that you're aware of and prosecuted them for war crimes?

Mr. MATHESON. I'm not aware of any offhand.

Mr. SMITH. Well, you mentioned that there's nothing to stop them now. I'm wondering if they might find it easier to do so or find a self-justification to do so if 2587 were expanded in jurisdiction.

Mr. MATHESON. No, I think not. What stops them now, if anything stops them, is the possibility of other measures being applied, as you've seen in the history of both of these countries. I do not think that the enactment of this bill will have any effect on their behavior.

Mr. SMITH. OK, thank you.

Mr. McNeill, do you believe that the signing of the third Geneva Convention, which protected prisoners of war, has ameliorated the treatment of American prisoners of war in conflicts since the Second World War? Do you believe that the enactment of H.R. 2587 would ameliorate the treatment of American prisoners of war in future conflicts?

Mr. MCNEIL. Well, Mr. Chairman, I think we can certainly hope that it would help. I think it would add to the overall effect—hopefully, an interrum effect—that we would like to create in the minds of those who would commit war crimes against our prisoners of war.

As you know, it has been a priority, a very leading priority, for our Department to look after situations in which our prisoners of war find themselves, both looking into the past and looking toward the future. We have tried to give a great deal of emphasis to the rights of prisoners of war under the Geneva Convention, and we think that maltreatment of our prisoners of war, such as occurred at the hands of Iraq—as you know, every one of our prisoners of war during the Gulf War was maltreated by Iraq—that these are extremely serious crimes against the law of armed conflict, against the Geneva Conventions. And we feel that these people should be brought to justice whenever possible, and we want to make sure that there is an infrastructure in the law prepared to address that problem, should we get the opportunity.

I think that the rules have created, to a certain extent, a deterrent effect against even more terrible atrocities than might have occurred otherwise. There's no way to gauge that, of course, and we do know that many outrages were committed in Vietnam and elsewhere against our POW's, but we want to continue in our effort to try to protect them in every way we can for the future and we think this is a good way of so doing.

Mr. SMITH. Thank you, Mr. McNeill.

The gentleman from Florida, Mr. McCollum, is recognized.

Mr. MCCOLLUM. Thank you very much.

Mr. Matheson, do any of the additional war crimes, as you've laid out in what you've proposed, require some kind of separate ratification by the Senate besides our just passing a criminal bill. Is there some process that, because of the nature of a convention, that requires them to address this separately?

Mr. MATHESON. Yes, absolutely. Several have already been ratified. Another one of those mentioned—that is, Additional Protocol II to the 1949 Conventions—has been submitted to the Senate, and we hope the Senate will ratify. And we expect shortly to submit the Land Mines Protocol to the Senate for ratification.

And our bill is carefully crafted so that, in the case of those agreements where such advice and consent has not yet been given, the legislation only operates after that happens.

Mr. MCCOLLUM. Thank you. Well, I was curious about that. But we need to encourage them to do that, in any event.

Mr. McNeill, Judge Everett, Professor Everett, who is going to testify, has suggested, and is going to suggest to us, that articles 18 and 21 of the UCMJ be amended, he says, to specifically empower courts-martials and military commissions to try anyone accused of a grave breach of any treaty to which H.R. 2587 may refer. And that is simply as an alternative, so that, in addition to the district court powers, that the powers of the military be clearly delineated to include anything we do in this act. Would there be a problem with doing that, in your eyes?

Mr. MCNEILL. Well, Mr. McCollum, I think that we in the Department of Defense right now would prefer to move ahead with the bill as it's currently drafted. The Uniform Code of Military Justice, as we know from the decision of the Supreme Court in the *Toth* case of 1955, has been deemed not to be an appropriate vehicle for prosecution of certain types of crimes, particularly with respect to the class of people I referred to in my testimony; that is, people who have been discharged and who may have committed while in active service something regarded as a war crime. It is appears that, from the *Toth* decision, that it would probably not be found constitutional to add that portion of jurisdiction to the UCMJ.

Mr. MCCOLLUM. Do you feel that currently, if we did anything that was less than adding more people, subject to the UCMJ jurisdiction, there would be no additional thing we'd be adding by expanding the opportunity to prosecute under the UCMJ? In other words, by any language we may throw in to cover grave breach or cover anything such as Mr. Matheson suggested may be needed to be covered, we don't need to do that in order to give you full jurisdiction over the persons who are now covered?

Mr. MCNEILL. Well, we do have full jurisdiction over our active duty people; that is correct. We also have jurisdiction of general courts-martial under the UCMJ. And, if I understood the judge's proposal correctly, it's based on his view that there is some residual authority under the Constitution to exercise jurisdiction under the UCMJ if—even now, without additional statutory authority. This is a point that I think many commentators are not clear about.

Mr. MCCOLLUM. All right, that's fair enough.

Mr. MCNEILL. And so we would see that the proposed legislation would, at the very least, clarify and move forward the authority of the executive branch and to say that we think it's constitutional and for the judicial branch to conduct the trials.

If I could just say in closing that this legislation also has the additional benefit as an opportunity for Members of Congress to endorse the idea that the United States, as a political matter, should be seen as fully in conformity with its international obligations in this very sensitive area. And so we think that's another distinct benefit that would flow from enactment of this legislation.

Mr. MCCOLLUM. Mr. Matheson, I believe that you would concur with the judge that we ought to expand the word in the bill called



"citizen" to something broader, so that you cover other people? He has suggested—and I think you may have, too—the term "national." I'm just wondering if that's broad enough. In other words, should we be including legal residents, citizens and legal resident aliens? How would we term this? I mean, what word would you use instead of "citizen" or what combination of words?

Mr. MATHESON. We were advised by the Justice Department that the proper word to use in this case was "nationals," which is defined in the Code. But, in fact, the formulation we propose goes well beyond just that simple category and includes any person who comes into the jurisdiction of the United States. So we've opted for a broader sweep than simply this class of persons that have some kind of allegiance to the United States, however you would define it.

Mr. MCCOLLUM. Last—and, again, I'm looking at some of the things you've said and also some of the criticism—there is the question the judge raises about capital punishment and the effect internationally that might have, if we leave capital punishment as a possibility in terms of being able to, get extradition. That's often been raised in the Crime Subcommittee with regard to some of the efforts we've made with piracy and hostage-taking, and so forth, over the years I've served on the committee. Is that a concern to the State Department, that we subject any of these folks to capital punishment or not?

Mr. MATHESON. It's not a concern in terms of these provisions of the U.S. Code. We know that we have difficulty when we try to negotiate any international instrument that would provide for capital punishment. In the case of the international tribunals, we proposed that they have the ability to impose a sentence of death, but the Europeans and others refuse to accept that. So we were not able to do it internationally. But in terms of the U.S. legislation, of course, the death penalty is provided for in many cases, and these are the most heinous crimes that one could imagine. And if any crime deserves this penalty or the possibility of such penalty, then it's this one.

Mr. MCCOLLUM. Very well. Thank you very much. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. McCollum.

Thank you, Mr. Matheson, Mr. McNeill, for joining us today and for your testimony as well.

Mr. MCNEILL. Thank you, sir.

Mr. SMITH. If the members of the second panel would come forward now—I will introduce you all as you take your seats.

Judge Robinson Everett is now a Senior Judge on the U.S. Court of Appeals for the Armed Forces, having formerly served as Chief Judge. He is founder of the Center on Law Ethics and National Security at the Duke University School of Law, and he is past chairman of the American Bar Association's Standing Committee on Military Law. Most interestingly, he was once counsel to the Senate Judiciary Committee.

Monroe Leigh is a partner at the law firm of Steptoe & Johnson here in Washington. He is chairman of the American Bar Association's Task Force on War Crimes in Yugoslavia and a member of the ABA's Standing Committee on Law and National Security. Mr.

Leigh is a member of the Department of State Legal Adviser's Public Advisory Committee on International Law. He has served as Assistant General Counsel for International Affairs at the Defense Department and Legal Advisor at the State Department.

Mark Zaid has a law practice here in Washington. He is vice chair of the American Bar Association International Criminal Law Committee's Section of Criminal Justice, and he has chaired the ABA's Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals. Mr. Zaid is a member of the International Law Association's Committee on a Permanent International Criminal Court.

I thank you all for being with us. We look forward to your testimony. And if I could urge you to keep it within the 5-minute time frame, that will allow us more time for questions since we're expecting a vote on the House floor in just a few minutes.

Again, thank you for being here, and we will start off with Judge Everett.

**STATEMENT OF HON. ROBINSON O. EVERETT, PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW, AND SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE ARMED FORCES**

Judge EVERETT. Mr. Chairman, let me express my appreciation to you and the committee and to Mr. McCollum for this opportunity to be here. I'm particularly proud that a North Carolinian, Congressman Jones, is the one who introduced this legislation.

You know, occasionally, we have these unfortunate jurisdictional gaps, and your reference to the time when I was serving as a counsel on the other side of Capitol Hill reminds me of one of the most unfortunate. It was one created in the midfifties by a couple of Supreme Court decisions that excluded continuing military jurisdiction over discharged service members and also precluded the trial of civilian defendants and employees. And for about 10 years, each session Senator Ervin would introduce a bill designed to create jurisdiction in Federal district courts to cure that jurisdictional gap. Fortunately, in the most recent appropriation bill legislation, I understand an advisory committee is now to be created at the Department of Defense to consider that issue. So these things take a long time to remedy, and I guess that's one reason we waited about 25 years on this particular matter.

I just want to summarize a few basic points and then answer any questions later that you may have.

First, I think the proposal by Congressman Jones is excellent. It's very important, very much needed. I think it should go further. I think, for example, that there should be jurisdiction with respect to crimes committed by American nationals. I have no doubt as to the constitutionality of broadening the Federal criminal jurisdiction. There are three cases that I think fully sustain that under article 1, section 8, clause 10, of the Constitution. These were cases that involved trials by military commissions, and, of course, the Congress has recently used this power very extensively in punishing skyjacking, terrorist activity, providing for protection of diplomats, and things of that sort.

I would, however, suggest a few things that I think are important. In the first place, I think it's very important that there be no

negative implication as to the jurisdiction which military tribunals now have. Therefore, I would hope there would be some specific language included making it clear that there is no repeal by implication of the jurisdiction that courts-martial and military commissions have under articles 18 and 21 of the Uniform Code. I think it would be particularly unfortunate if that repeal occurred because there are going to be many of these situations, in my opinion, where military tribunals will be the only way to try the crime because of the fact that witnesses cannot be brought to the United States. And I think that in some of these situations having the jurisdiction of military courts is going to be very important.

Second, I agree fully with the State Department that the word "citizen" should be broadened. "National" seems to be the accepted term, as Congressman McCollum brought out, even "national" may not be broad enough to cover all the matters as to which I would have concern.

I think there should be an expansion of jurisdiction to make it clear that if an American service member or someone connected with the military commits one of these war crimes, then that person would be included within the jurisdiction that is being broadened by this proposed legislation.

Frankly, I would go further than the State Department in broadening jurisdiction. I would broaden it to include anything that falls within the universal jurisdiction of the courts, a jurisdiction that has been recognized in connection with the law of war, but which can go even further. And it seems to me that it is important to have the jurisdiction, to have it in the Federal district courts, whether or not it is exercised. I think it's important to have guidelines for exercise, but to have the jurisdiction is important, even though there may be a very ample room for prosecutorial discretion in deciding whether or not to exercise it.

Indeed, I suggest in my statement that there may be advantages in the international arena from having the jurisdiction. I'm thinking of the situation that arose under the Status of Forces Agreement with Japan in the midfifties, after the Supreme Court had ruled there was no jurisdiction over civilian dependents. This precluded the opportunity for having these persons tried by American courts. The Japanese were regularly waiving primary jurisdiction, so we could try our own citizens. But once it was established there was no jurisdiction in any American court, the alternative was either trial by a Japanese court or no trial at all. And that situation led me to write an article entitled, "Crime Without Punishment," because of the jurisdictional gap which was created.

I would suggest that articles 18 and 21 of the Uniform Code be expanded to include any of the matters that are brought within the jurisdiction of the Federal district court under this War Crimes Act. I think that this is important because, as I mentioned earlier, there may be opportunities to use this type of court, a military court, when a civilian court simply will not be able to function.

A couple of final things: first, as to the death penalty, I have no opposition to the death penalty. In fact, an opinion that I wrote a week ago was upheld by the Supreme Court when they upheld the death penalty for persons in the military. However, I think as a practical matter, given what's happened in the international arena,

if you include a death penalty, it's going to be a lightning rod; it creates more problems than it's worth. And, of course, by the same token, I would exclude applicability of the sentencing guidelines.

I think that covers the main points here, and I'll be glad later to respond to questions.

[The prepared statement of Judge Everett follows:]

PREPARED STATEMENT OF HON. ROBINSON O. EVERETT, PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW, AND SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE ARMED FORCES

At the outset let me express my thanks to this Committee for the opportunity to discuss with you H.R. 2587. Frankly I believe that this bill introduced by my fellow Tar Heel Congressman Walter B. Jones, Jr., is very significant and addresses an important need.

Unfortunately from time to time we discover that important jurisdictional gaps exist in our criminal laws. For example, as a result of two Supreme Court decisions in the 1950's—*Toth v. Quarles*, 350 U.S. 1 (1955) and *Reid v. Covert*, 354 U.S. 1 (1957)—we learned that sometimes no tribunal, civilian or military, will be available to deal with serious crimes committed by former service members or by civilian dependents or employees accompanying the Armed Services overseas. See Everett & Hourcle, *Crime Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, 13 A.F.L. Rev. 184 (1971). Thereafter, during the next decade, Senator Sam Ervin, Jr.—for whom I served at one time as a counsel—repeatedly proposed legislation to fill some of these jurisdictional voids; but not until a few months ago did Congress address the problem by creating an Advisory Committee on Criminal Law Jurisdiction over Civilians Accompanying the Armed Forces in Time of Armed Conflict. See Section 1151 of the National Defense Authorization Act for FY 1996.

H.R. 2587 represents an effort to assure that our Federal courts will not lack jurisdiction to deal with war crimes of which our service members and nationals may be victims. How ironic it would be if persons who had perpetrated war crimes against American servicemembers could subsequently visit our country without any concern that they might be tried and punished for their crimes. Thus, the wisdom of enacting legislation such as H.R. 2587 seems almost self-evident to me.

Likewise, if our own servicemembers perpetrate war crimes, they also should not be immune from trial and punishment in our Federal courts. Under *Toth v. Quarles*, *supra*, this becomes especially important if the servicemember has been separated from the Armed Services subsequent to commission of the war crimes, because at that point, the military jurisdiction will have terminated as to conduct which not only is a war crime but also in some way violates the Uniform Code of Military Justice.

I have no doubt about the constitutionality of broadening federal criminal jurisdiction as proposed by H.R. 2587—or an expanded version of that bill. Article I, section 8, cl. 10 of the Constitution empowers Congress to "define and punish Piracies and . . . Offenses Against the Law of Nations." That war crimes qualify as such offenses has been made clear by three Supreme Court decisions—*Ex parte Quinn*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); and, *Madsen v. Kinsella*, 78 S. Ct. 697 (1952). In those cases, the jurisdiction of American military tribunals was upheld under the law of war, which is included within the law of nations.

Indeed, responding to the threat of terrorism, Congress has recently used on three occasions its power to "define and punish" crimes against international law. The Aircraft Sabotage Act, P.L. No. 98-473 (1984), codified at 18 U.S.C. § 631.2, 40 U.S.C. App. §§ 1301, 1471, 1972 (Supp. V. 1987), makes punishable aircraft hijacking which results in harm to American passengers and planes, wherever the terrorist incident takes place. Another statute is directed at terrorists who take hostages in order to influence the United States government and applies if either the hijacker or the victim is an American. Act for the Prevention and Punishment of the Crime of Hostage-Taking. 18 U.S.C. § 1203 (1988). This statute provided a basis for the successful prosecution of Fawaz Yunis, a Lebanese who hijacked a Jordanian airline with two American passengers. See *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). A third statute seeks to provide greater security for American diplomats. See Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, Public Law No. 99-399 (1986).

In connection with the Committee's consideration of H.R. 2587, I would, however, propose several additions. First, I would include specific language to make clear that the creation of jurisdiction over war crimes in Federal district courts is not intended by negative implication to deprive military tribunals of any jurisdiction that they

might possess under Articles 18 and 21 of the Uniform Code of Military Justice, 10 U.S.C. §818, §821 or otherwise. Courts-martial and military commissions may provide a necessary forum for trying war crimes when practical obstacles, such as inability to bring witnesses to the United States, preclude successful prosecution in a Federal district court sitting in the United States.

Secondly, as suggested by the State Department, I would replace the word "citizen" with some broader term—such as "national." It would be anomalous to deny protection to aliens long resident in and connected with the United States—perhaps even spouses of American citizens. Also, in line with the State Department's recommendation, I would expand the scope of H.R. 2587 to include not only violations of the Geneva Conventions but also violations of several other major treaties entered into by the United States—such as the Hague Convention and the treaties concerned with land mines. These treaties help delineate the duties and responsibilities imposed by the law of nations and for Congress to provide for punishment of violations of those treaties is within its power under Article I, section 8, cl. 10 of our Constitution.

An ancillary benefit is derived from broadening jurisdiction in this manner. Undoubtedly, occasions will arise in the future when an American national or a person under American control or in American custody will be accused of having violated treaty provisions and demands will be made that the person accused be delivered for trial in the courts of the foreign country where the alleged crimes occurred or for trial in some International Criminal Court, like that which now sits at the Hague to try certain grave breaches of international law in the former Yugoslavia and Rwanda. If American courts have jurisdiction to try the accused for the alleged offense, a basis exists for conducting the trial in our own courts, where important procedural protection exist. However, if our courts lack jurisdiction, treaty obligations may require the United States to surrender the accused or detain the accused for trial elsewhere. In short, I believe that broadening the jurisdiction of American courts may in some instances assure procedural protections for any of our own citizens who are accused of grave breaches of international law and may allow our country to "wash its own dirty linen."

I would probably go much further than the State Department in broadening the jurisdiction of Federal courts to try war crimes. Instead of relying for jurisdiction solely on the nationality of the offender or the victim, I would suggest that jurisdiction be predicated on the principle of universality, which is increasingly recognized in the "law of nations." In short, some crimes—like privacy in ancient times—are so generally viewed as heinous that they should be subject to prosecution in the courts of any civilized country. If the heinousness of a crime and its impact on the international community have been recognized by treaties into which our countries and many others have entered, American courts should have jurisdiction over that crime. Of course, possession of jurisdiction is not the same as exercise of that jurisdiction; and prosecutorial discretion can be employed to determine which cases should be brought to trial.

I would also suggest that Articles 18 and 21 of the Uniform Code of Military Justice be amended specifically to empower courts-martial and military commission to try anyone accused of a "grave breach" of any treaty to which H.R. 2587 may refer. Just as for traditional war crimes, there may be occasions when a court-martial or military commission is in a better position to conduct a trial than a district court would be. Indeed, when American servicemembers are accused, the expansion of Title 18 to include punishment for "grave breaches" would probably of itself broaden the jurisdiction of courts-martial. The third clause of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. §934, which concerns "crimes and offenses not capital," incorporates federal criminal statutes into military law—just as under some circumstances the Assimilative Crimes Act, 18 U.S.C. §13, incorporate state criminal law into Federal criminal law. Cf. *U.S. v. Sharpnack*, 255 U.S. 286 (1958).

I realize that in suggesting an addition to the jurisdiction of military tribunals, I venture into an area which is the specific concern of a different congressional committee, and so perhaps my suggestion is premature. Nonetheless, it would be desirable if any loose ends could be tidied up at this time.

My final suggestion concerns punishment for war crimes. First, I would specifically exclude such offenses from the scope of Federal Sentencing Guidelines. Secondly I would omit any provision for capital punishment. Admittedly, there is ample precedent for punishing war crimes by death. Cf. *Quinn* and *Yamashita*, *supra*. However, the International Criminal Court established for trial of war crimes in the former Yugoslavia and in Rwanda does not have jurisdiction to impose death penalties. I also recall that on European country was unwilling to deliver an American servicemember for trial by general court martial pursuant to the NATO Status of Forces Agreement, until military authorities agree to handle the case as non-capital.

In light of the widespread opposition to death penalties, I suspect that the benefits derived from authorizing a death penalty for war crimes would be outweighed by the disadvantages.

In conclusion, may I commend this Committee for conducting hearings on this important subject.

Mr. SMITH. Thank you, Judge Everett.

Mr. Leigh.

**STATEMENT OF MONROE LEIGH, PARTNER, STEPTOE & JOHNSON, FORMER ASSISTANT GENERAL COUNSEL FOR INTERNATIONAL AFFAIRS, DEPARTMENT OF DEFENSE, AND CHAIRMAN, AMERICAN BAR ASSOCIATION TASK FORCE ON WAR CRIMES IN YUGOSLAVIA**

Mr. LEIGH. Thank you very much, Mr. Chairman.

In 1955, I was in the Pentagon and I participated in the preparation of the administration's testimony in support of the advice and consent to the four Geneva Conventions. And let me say that within the administration the pressure for action at that time came primarily from the military services. I want to make that clear. They were very anxious to get on with the task of educating the troops as to what was required by the 1949 Conventions. I say that because I'd like the record to reflect it.

Let me spend just a little time talking about the reasons which led the administration, as I look at it now 41 years later, to take a minimalist approach as to the implementing legislation. First of all, we were at the conclusion of the Korean War, and you may remember that in that war we had a serious disagreement with the Communists regarding the application of the Conventions. And, in fact, it was that disagreement which led the Truman administration to request that the hearings on the Conventions, which had originally been requested for 1951, be postponed, and they were postponed until 1955.

The reason for that has to do with article 118 of the 1949 POW Convention. That has language which was interpreted in a similar context at the end of World War II as requiring forcible repatriation of POW's under the 1929 Convention. General Eisenhower did order the forcible repatriation, as did other allied commanders in Europe at the end of World War II.

The Communists took the same position as to the proper interpretation of article 118 in the 1949 Conventions. The State Department was very anxious not to have that controversy ventilated in the 1950's because the United States was taking the position—and I think justifiably—that article 118 did not require forcible repatriation and did not in any way interfere with the right of a sovereign nation to grant asylum to those who didn't want to return to the countries to which they owed allegiance. So that was one reason.

The second reason I think had to do with the Bricker amendment, which was very active in the early days of the Eisenhower administration. Now that's a curious provision; I don't want to go into the details; it would take too much time. But, basically, there was a view in various circles in the United States, in the American Bar Association, and in the Congress that treaties were being adopted and were being used to bootstrap the power of the Congress to enact legislation which it would not otherwise have been able to enact.

Now I don't want to go into the details of it, but it was very much the position of the Eisenhower administration that they did not wish to draw any kind of controversy about the Bricker amendment, because the year before they had survived a very near passage of a substitute for the Bricker amendment. So that was one reason that they took the minimalist approach.

And then, finally, I'd have to be candid and say that most administrations, when they look at the situation of securing implementing legislation, think it's easier to convince one body than two. Now that doesn't always prevail; sometimes they think it's easier to get a majority vote in two Houses than to get two-thirds in one. But, nevertheless, I think that was one of the influences.

In any case, I mention these three points; I think really none of them now applies to this situation, and I think it is desirable that the United States should go ahead at this time with implementing legislation.

I have, by the way, a letter, which was filed in 1955 by the Department of Justice, outlining its views on what implementing legislation was needed. It's a two-page letter, and I'll offer that for inclusion in the record.

Mr. SMITH. Without objection, it will be.

[The information follows:]

## 58 GENEVA CONVENTIONS FOR PROTECTION OF WAR VICTIMS

DEPARTMENT OF JUSTICE,  
Washington 25, D. C., June 7, 1955.

HONORABLE WALTER F. GEORGE,  
*United States Senate, Washington, D. C.*

MY DEAR SENATOR GEORGE: During the hearing before the Senate Committee on Foreign Relations on June 3, 1955, on the Geneva conventions of 1949, several members of the committee raised questions which deserve more detailed answers.

Thus, Senator Hickenlooper inquired whether the articles of the convention dealing with "grave breaches" would, upon ratification of the conventions by the United States, enlarge the legislative powers of Congress. The articles in question are articles 49 and 50 of the convention for the amelioration of the condition of the wounded and sick in armed forces in the field, articles 50 and 51 of the convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea; articles 129 and 130 of the prisoner of war convention; and articles 146 and 147 of the civilian convention. These articles dealing with grave breaches are identical in the four conventions except the enumeration of the violations of a particular convention which constitute grave breaches varies somewhat with the subject matter of the conventions.

Article I, section 8, clause 10, of the Constitution expressly empowers Congress "to define and punish \* \* \* offenses against the law of nations." In *United States v. Arjona* (120 U. S. 479) the Supreme Court sustained the power of Congress, under article I, section 8, to enact a criminal statute prohibiting counterfeiting of foreign currency within the United States. More recently in *Ex parte Quirin* (317 U. S. 1) and *In re Yamashita* (327 U. S. 1) the Supreme Court held that Congress had power under article I, section 8, to provide for the trial and punishment of offenses against the law of war (as a part of the law of nations) as defined in the Hague Regulations or elsewhere in international law. It is significant that neither the Quirin nor Yamashita cases involved any treaty obligation of the United States to provide penal sanction for violation of the law of war.

Independently of the existence of offenses against the law of nations or of any treaties for the protection of war victims, Congress has broad authority under the Constitution to provide penal sanctions for the mistreatment of such persons. Under its war powers as set forth in the Constitution, Congress could regulate the treatment accorded by the United States to enemy sick and wounded, prisoners of war, civilian internees, and the inhabitants of territory occupied by our Armed Forces. It can enact the criminal sanction required to prevent interference with the discharge of these necessary war functions. Also, such legislative power may be found in more specific provisions of the Constitution. Thus, exercising its power under article I, section 8, clause 14, "to make rules for the government and regulation of the land and naval forces," Congress could provide penal sanctions for the mistreatment of such persons by members of our Armed Forces. Consequently, the conventions would not create in the Congress a power to impose penal sanctions in this area which it would otherwise lack under the Constitution.

A review of existing legislation reveals no need to enact further legislation in order to provide effective penal sanctions for those violations of the Geneva conventions which are designated as grave breaches. Under the Uniform Code of Military Justice, military courts already have jurisdiction to try for violations of the laws of war members of our own Armed Forces, captured enemy military personnel, and the inhabitants of occupied territory. Moreover, since most of the acts designated as grave breaches would violate our Federal and State penal laws, they could be tried in our civil courts if committed within the United States.

In a related question, Senator Mansfield asked whether the articles dealing with grave breaches could result in imposing criminal liability upon persons without official status. Generally, the acts designated as grave breaches are to be treated as such only when they are in some way the result of action by civilian or military agents of a detaining or occupying power in violation of the conventions. Moreover, as a practical matter, only persons exercising governmental authority ordinarily would be in a position to commit grave breaches against protected persons, such as the serious mistreatment of prisoners of war, sick and wounded of the armed forces, civilian internees, or the inhabitants of occupied territory. We are reluctant to state that the mistreatment of a person protected by the conventions by a private person (e. g., the killing of a wounded airman) could never constitute a grave breach no matter what the intent and



circumstances. However, it is entirely clear that these provisions of the conventions were not intended to convert into grave breaches every common crime in which the victim happens to be a person protected by the conventions.

During the hearing before the committee on June 3, there may have been a misunderstanding as to whether, upon ratification of the conventions, it will be necessary for the United States to enact any legislation to implement and comply with the conventions. Actually, the United States will be required to enact only relatively minor legislation clearly within the power of Congress. The problem of continued use of the Red Cross emblem by commercial users in this country has already been presented to the committee. In addition it should be noted that title 18 United States Code 706 presently limits the use of the Red Cross emblem to the American National Red Cross and to the medical services of the Armed Forces (in addition to the pre-1905 commercial users). However, the Geneva conventions of 1949 for the first time authorized the use of the protective Red Cross emblem by the International Committee of the Red Cross, civilian hospitals and their personnel, and convoys of vehicles, hospital trains, and aircraft conveying wounded and sick civilians. It would seem to be appropriate to amend section 706 to permit such additional uses of the emblem, and the agencies concerned will recommend to the Congress legislation to this effect.

Article 53 of the convention for the protection of the sick and wounded also prohibits private or commercial use of the emblems of a red crescent on a white background and a red lion and sun on a white background, which are used, respectively, by Turkey and certain other Moslem countries and by Iran, in place of the Red Cross emblem. However, this prohibition of article 53 is by its express terms "without any effect upon any rights acquired through prior use." Since we have no legislation restricting the use of these emblems, the United States will be obligated to enact legislation (as by amending 18 U. S. C. 706) prohibiting the private and commercial uses of such emblems, excepting the rights acquired by prior use.

Similarly, article 23 of the Prisoner of War Convention provides that only prisoner of war camps shall be marked "PW" or "PG" (prisonniers de guerre), while article 82 of the Civilian Convention provides that no place other than internment camps shall be marked "IC". It would seem that the United States should provide penal sanctions for misleading use of these designations.

Depending upon whether civilian internees in a future conflict work for public or private employers, and depending upon the type of work they perform, it might be necessary to implement article 95 of the Civilian Convention with legislation providing workmen's compensation protection where it would not be available under existing Federal and State legislation. However, consideration of such legislation might be deferred until such time as the problem may be presented in more specific form.

Article 74 of the Prisoners of War Convention and article 110 of the Civilian Convention provide that all relief shipments for prisoners of war and civilian internees shall be exempt from import, customs and other duties. Although title 19 United States Code 1318 provides that during a war or national emergency the President may authorize the Secretary of the Treasury to permit the duty-free importation of food, clothing, and other supplies for use in emergency relief work, it was apparently considered necessary in World War II to enact specific legislation (act of June 27, 1942, 56 Stat. 461, 462) to implement article 38 of the 1929 Prisoner of War Convention by providing for the exemption from all duties and customs charges of articles addressed to prisoners of war and civilian internees in the United States. Accordingly, it may be appropriate to revive this statute to comply with the Geneva conventions of 1949.

I may say that the Departments of State and Defense concur in the views stated above. Please advise me if I can be of further assistance to the committee.

Sincerely yours,

J. LEE RANKIN,  
Assistant Attorney General, Office of Legal Counsel.

Mr. LEIGH. So, finally, then, let me just say that it seems to me it's desirable to universalize the prohibitions in this case. It seems to me also desirable that we federalize the prohibitions in this case.

The view was taken in 1955 that we had a choice: we could either prosecute under State law or Federal law, or if we couldn't do that, why, then, we could extradite. And that leads me to my last point.

If you extradite, of course, it may mean that Americans who may have, God forbid, committed crimes against the laws of war might have to be extradited under the treaty to other countries. I think it's preferable that the United States be able to keep it's people in this country and have them tried here, if they have to be tried for offenses against the treaty.

So, in short, Mr. Chairman, I favor this legislation. I favor the expanded version, and I hope Congress will be able to act upon it this session.

[The prepared statement of Mr. Leigh follows:]

PREPARED STATEMENT OF MONROE LEIGH, PARTNER, STEPTOE & JOHNSON, FORMER ASSISTANT GENERAL COUNSEL FOR INTERNATIONAL AFFAIRS, DEPARTMENT OF DEFENSE, AND CHAIRMAN, AMERICAN BAR ASSOCIATION TASK FORCE ON WAR CRIMES IN YUGOSLAVIA

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you in response to your request. My name is Monroe Leigh. I am a partner in the Washington, D.C. law firm of Steptoe & Johnson. From 1975 to 1977, I served as Legal Adviser to the Department of State. I am appearing here today to support the passage of H.R. 2587, the War Crimes Act of 1995.

I would like to focus my testimony today on three subjects: (1) the U.S. obligations under the Geneva Conventions; (2) the reasons Congress did not contemplate implementing legislation in support of those obligations when considering ratification of the Conventions in 1955; and (3) the reasons such implementing legislation is necessary today.

#### U.S. OBLIGATIONS UNDER THE GENEVA CONVENTIONS

The War Crimes Act of 1995 implements U.S. obligations under the Geneva Conventions of 1949. Article 49, and corresponding articles in the other Conventions of 1949, provides that the signatory parties enact any necessary legislation to provide sanctions for persons involved in "grave breaches" of the Conventions. The Article further provides that parties to the Conventions must either try or extradite persons alleged to have committed any such "grave breaches."

Article 50 lists these "grave breaches" as willful killing, torture, inhuman treatment, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

#### NO IMPLEMENTING LEGISLATION WAS ENACTED IN 1955

The President presented the Geneva Conventions of 1949 to the Senate on April 26, 1951. Issues arising from the conflict in Korea, however, led the Executive Branch to request the Senate to defer action until 1955. The Committee Report in 1955 stated that the "grave breaches" provisions of the Conventions are not self-executing and do not create international criminal law.

However, Congress did not enact implementing legislation at that time. The Executive Branch was persuaded that existing federal and state criminal law in the United States already covered the "grave breaches" listed in Article 50, and U.S. treaties already provide proper extradition proceedings with other nations. Therefore, the obligations of Article 49 to try or extradite anyone accused of a "grave breach" could be discharged without any new U.S. legislation on this subject.

The view in 1955 was that Article 49 was primarily directed at other contracting parties that had not yet passed adequate legislation. According to that view, the purpose of Article 49 of the First Geneva Convention was to remedy a situation in which an individual commits a crime, subsequently becomes a prisoner of war in a foreign country, and then seeks asylum within that foreign country. This concern

stemmed from the real World War II problem in which war criminals avoided punishment by finding sanctuary in neutral nations. Article 49 requires those countries to enact legislation sanctioning "grave breaches" and to prosecute or extradite the offender.

It is worth recalling that during the Korean conflict the United States took the position that Article 118 of the Geneva Conventions does not require forcible repatriation. Article 118 states that prisoners of war must be released and repatriated without delay after the cessation of hostilities. Similar language in the 1929 POW Convention had been interpreted by the Allied Powers after World War II as requiring forcible repatriation. The U.S. position in 1955 was that Article 118 does nothing to preclude asylum for prisoners of war under accepted principles of international law. In fact prisoners of war in the Korean conflict were allowed to choose asylum instead of returning to their home country. This was one of the most contested issues during the armistice negotiations. It was this controversial issue which prompted the Executive Branch in 1951 to request that consideration of the 1949 Conventions be deferred.

#### IMPLEMENTING LEGISLATION IS NECESSARY TODAY

I believe that consideration of the War Crimes Act of 1995 should not be affected by the U.S. position with respect to the prisoners of war in the Korean conflict who did not wish to be repatriated to their home countries. The U.S. position during the Korean conflict concerned forcible repatriation of prisoners of war who faced possible political persecution upon return to their homeland.

I would like to lend my support to the expansive version of the War Crimes Act, endorsed by the Department of State. This expanded version of the Act is not limited to the "grave breaches" listed in Article 50 but also covers other "war crimes" such as those proscribed in the Hague Regulations of 1907. The expanded version also covers a broader category of offenders. H.R. 2587 applies only to offenses where the victim is a U.S. citizen or a member of the U.S. armed forces. It does not cover offenses where the victim is not a U.S. citizen or member of the U.S. ground forces. In my view it is desirable to target such offenses irrespective of who the victims are. This expanded coverage is tailored more realistically to present needs than the list of criminal acts in Article 50, which was based on a minimalist approach to the obligations of the United States. Furthermore, as I read the State Department draft it federalizes punishment for grave breaches and other war crimes and I think this is also desirable.

Even assuming that U.S. state and federal laws already cover the "grave breaches" listed in Article 50, it is not an exclusive list of the possible crimes that the United States can address through legislation. The list of "grave breaches" in Article 50 only represents the criminal acts that were of utmost concern following World Wars I and II and on which agreement could be reached.<sup>1</sup>

Finally, it is also worth recalling that the position of the Government as to implementing legislation was influenced by the Brinker Amendment controversy. Senator Bricker proposed a constitutional amendment in the 1950's which was intended to restrict the power of the government in making and implementing treaties. This was a proposal which the Eisenhower Administration strongly opposed. In 1954 it came within a vote or two of approval in the Senate. And its revival was still possible in 1955. For this reason, the administration wanted as little legislation as possible in implementation of the 1949 treaties.

#### CONCLUSION

The Senate Committee on Foreign Relations did not find a need in 1955 for implementing legislation to extend existing U.S. law on "grave breaches" or other war crimes. The Committee made that determination, however, over forty years ago and thus did not take into account circumstances that have since changed; implementing

<sup>1</sup>This fact is best demonstrated by the exchange between Robert Murphy, then Deputy Under Secretary of State, and Senator Capehart during the 1955 Committee hearings:

Senator CAPEHART. . . . Now, my question is: Are there listed in article 50 or thereafter all of the specific things that might well be legislated upon?

Mr. MURPHY. We think, Senator, that those headings certainly comprise the bulk of the possible crimes that could be envisaged here, and it was the total list on which agreement could be achieved at Geneva.

Senator CAPEHART. But it is not necessary to limit it to those listings?

Mr. MURPHY. No. . . . [but these were the principal ones that came out of the experiences of World War I and World War II.

legislation is now needed. The War Crimes Act of 1995 is desirable implementing legislation to ensure that the humanitarian goals of the Geneva Conventions be met. That concludes my statement, Mr. Chairman. I would be glad to answer any questions you or members of the Subcommittee may have.

Mr. SMITH. Thank you, Mr. Leigh.  
Mr. Zaid.

**STATEMENT OF MARK S. ZAID, LAW OFFICE OF MARK S. ZAID,  
VICE CHAIR, INTERNATIONAL CRIMINAL LAW COMMITTEE,  
SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION,  
AND CHAIR, AMERICAN BAR ASSOCIATION TASK  
FORCE ON PROPOSED PROTOCOLS OF EVIDENCE AND PRO-  
CEDURE FOR FUTURE WAR CRIMES TRIBUNALS**

Mr. ZAID. Thank you, Mr. Chairman, Mr. McCollum. I appreciate the opportunity to appear before you. I submitted my detailed testimony, which I would ask to be included in the record, and I will just summarize. I do apologize for submitting it late, but I was out of the country until late Monday evening.

I applaud Congressman Jones' effort to create a statutory mechanism as proposed here. However, I would urge the subcommittee to take the additional steps to adopt the principles of universal jurisdiction promoted by the Departments of State and Defense. By restricting the scope of our laws to apply only to the basis of territoriality or nationality of the victim or perpetrator could have the obscene effect of allowing murderers to live free among us. Mr. Chairman, could you imagine one day coming home to discover that your next-door neighbor is Idi Amin or Pol Pot, and that despite the strength that your Government possesses as the sole superpower, they are powerless to prosecute that person? In fact, the best they could do, even if it were Adolph Hitler, would be to seek the extradition or deportation of the person, a process that could take years and have the perverse result of allowing that murderer to live his life out in luxury in another country. This, Mr. Chairman, has oftentimes been the result of United States' efforts to conduct judicial proceedings against suspected Nazi war criminals that were living among us, and it should not be allowed to continue were future war criminals to seek refuge here in the United States.

For the past 3 years, I've worked extensively on matters dealing with war crimes, the creation of an international criminal court and terrorism. In fact, I serve as cocounsel to families of the victims of Pan Am 103 in their civil litigation against the Government of Libya here in the United States.

What I would like to do is just briefly summarize what I have submitted in my statement, as well as offer three suggestions to the proposed legislation.

Universal jurisdiction stems back all the way to the 1600's, arising out of piracy. In modern times, since 1935 or so with the Harvard draft, it's been gaining predominant acceptance. Of course, universal jurisdiction recognizes that the crimes are so heinous that any state has an interest in prosecuting the individuals that might have perpetrated it. Of the few international crimes that are held to permit universal jurisdiction, there is no doubt that war crimes is explicitly within that category. And, as Mr. McNeill had mentioned, the four Geneva Conventions absolutely mandate the

imposition of universal jurisdiction by those states that are party to it. Therefore, under international law, the United States is obligated to assert this type of jurisdiction, and, in fact, not to adopt the revision suggested by the Departments of State and Defense, we would fall far short of what we were required to do over 40 years ago.

Now, of course, adopting this principle does not mean that we will need to commence prosecution each and every time a suspected war criminal is found within our territory. We can always seek to extradite or deport that individual, but where there's not a state willing to accept the individual or prosecute the individual, we are going to be left with a gap where that individual would go unpunished.

Since World War II, the United States has ratified several Conventions that also impose the exercise of universal jurisdiction. This demonstrates not only the executive branch's support, but the Senate's as well, of course.

International conventions on torture, hostage-taking, hijacking and sabotage of aircraft, crimes against internationally-protected persons, all contain provisions, with minor variations, requiring universal jurisdiction. Indeed, in the 1980's several Federal courts, both in the criminal and civil context, have recognized and acknowledged universal jurisdiction over acts of terrorism, torture, and war crimes.

Of course, the best example that comes to mind would be the international military tribunal that we established following the defeat of Nazi Germany, and the subsequent war crimes trials that were held by U.S. military tribunals offer even more explicit support for universal jurisdiction. Several of our key allies as well—for instance, Israel, the United Kingdom, Canada, Australia, and Ireland—have already adopted implementing legislation under the Geneva Conventions or have at least prosecuted suspected war criminals under the theory of universal jurisdiction. This demonstrates the growing trend toward ensuring that perpetrators of war crimes must not go unpunished regardless of where the act might have taken place.

Mr. Chairman, I would suggest three amendments to this pending legislation. I echo what Judge Everett said about the death penalty. The fact is that many states have prohibitions in their national laws against the death penalty, and in recent times, in fact, the European Court of Human Rights refused to extradite an individual to the United States because of the fact that death row to them was considered inhumane.

So imagine a situation where an American, whether a member of our Armed Forces or a civilian, is harmed or killed as a result of a war crime in another country, and a prime suspect is in custody. Because the possibility of the death penalty might be imposed, that country would not extradite that individual. There, where our interests are paramount, we would want to have a provision in the legislation that should that country's laws prohibit the death penalty, it could be waived in that instance.

I will quickly summarize the two remaining points. Civil remedies must be recognized for American victims. We have the strange occurrence here that an alien national would be allowed to

seek civil remedies under this legislation, but not an American victim, and that should be remedied as well.

And then, finally, it would seem quite ironic to allow universal jurisdiction for crimes of war crimes but not crimes of genocide. And so the Proxmire Act of 1988 should, likewise, be amended within this legislation.

In concluding, Mr. Chairman, the cries of "Never forget" that arose out of the ashes of the 6 million murdered in the Holocaust are still sadly being drowned out by the millions that are being murdered today. In ensuring that we never forget those who are victimized by such atrocities, we must strive to "always prosecute" those that cause such unjustified and inexcusable suffering.

Thank you.

[The prepared statement of Mr. Zaid follows:]

PREPARED STATEMENT OF MARK S. ZAID,<sup>1</sup> LAW OFFICE OF MARK S. ZAID, VICE CHAIR, INTERNATIONAL CRIMINAL LAW COMMITTEE, SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, AND CHAIR, AMERICAN ASSOCIATION TASK FORCE ON PROPOSED PROTOCOLS OF EVIDENCE AND PROCEDURE FOR FUTURE WAR CRIMES TRIBUNALS

Mr. Chairman, distinguished members of the Subcommittee, thank you for the opportunity to appear before you and offer my comments on H.R. 2587 and the suggested Administration amendments. As you know, the original bill would provide criminal jurisdiction to the United States so as to enable prosecution of those who may have committed war crimes, as defined by the four Geneva Conventions, against American nationals or within our territorial boundaries. I applaud Congressman Walter Jones' efforts to create a statutory mechanism to bring to justice those individuals who would commit such unspeakable acts.

However, I would urge this Subcommittee to take the additional steps to adopt the principles of universal jurisdiction suggested by the U.S. Departments of State and Defense. By restricting the scope of our laws to apply only on the basis of territoriality or nationality of the victim could have the obscene effect of allowing murderers live free among us. Mr. Chairman, can you imagine one day discovering that your next door neighbor is Idi Amin or Pol Pot, individuals who are responsible for the murders of millions of innocent victims, and that despite the strength your government possesses as the sole superpower in the world, it is powerless to prosecute that person on even one count of murder. The best it could do, even were the person Adolph Hitler, would be to seek the extradition or deportation of the individual, a process that could take years and have the perverse result of permitting a murderer, such as those I have just named, to live out their life in luxury in another country. This, Mr. chairman, has oftentimes been the result of the United States' judicial proceedings brought against suspected Nazi war criminals living as our neighbors and it must not be allowed to continue in this manner should future war criminals seek refuge in our country.

I have provided below a history and analysis of why the exercise of universal jurisdiction is not only appropriate as a matter of international and United States domestic law and public policy, but it is also our obligation under international law. Finally, I submit some additional suggestions to the proposed legislation to ensure that American interests are best served.

For the past three years I have worked extensively on matters dealing with war crimes, particularly with respect to the ad hoc criminal tribunals for the former

<sup>1</sup>Law Office of Mark S. Zaid, 1501 M Street, NW., Suite 1175, Washington, D.C. 20005. Tel. No. (202) 785-3801; Fax No. (202) 223-4826. Mark Zaid is the Chair of the American Bar Association's Task Force on Proposed Protocols on Evidence and Procedure for Future War Crimes Tribunals and a member of the Committee of Experts on the Establishment of an International Criminal Court organized under the auspices of the Association Internationale de Droit Penal, the Istituto Superiore Internazionale di Scienze Criminali and the Max Planck Institute for Foreign and International Penal Law. In the latter position, he served as the reporter on the jurisdictional sections of the "Draft Statute for an International Criminal Court Suggested Modifications to the 1994 ILC Draft (Updated Siracusa Draft)" which was presented for consideration by the Preparatory Committee on the Establishment of a Permanent International Court Pursuant to G.A. Res. 50/46 (1995). The views expressed by Mr. Zaid are his own and do not necessarily reflect the views of any organization or entity with which he is or has been affiliated.

Yugoslavia and Rwanda and the creation of a permanent international criminal court, as well as other crimes of universal jurisdiction such as certain acts of terrorism. In the latter category, I serve as co-counsel for the families of victims of Pan Am Flight 103 who are pursuing civil remedies in the United States against the government of Libya for the terrorist bombing of December 21, 1988 that claimed the lives of 270 persons, including 189 Americans.

Enactment of this legislation would not only meet our international obligations, but would also serve to promote the moral and legal principles for which this nation was created and still stands upon. The capture and punishment by any State of one who commits a war crime benefits the entire international community and is a notion the United States should actively support through legislative means.

#### UNIVERSAL JURISDICTION OVER WAR CRIMES IS HISTORICALLY WELL-SETTLED

"[T]he history of universal jurisdiction stems from the customary international practices regarding pirates and brigands in the 1600s; even '[b]efore International Law in the modern sense of the term was in existence. . . .'"<sup>2</sup> Indeed, over 360 years ago Hugo Grotius gave his approval to the concept of the right of states to try crimes committed outside their territorial jurisdiction when those crimes violated the law of nature or the law of nations:

. . . Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, does now, since Civil Societies, and Courts and Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have Authority over others, but as they are in Subjection to none. For . . . it is so much more honourable, to revenge other Peoples Injuries rather than their own . . . Kings, beside the Charge of their particular Dominions, have upon them the care of human Society in general.<sup>3</sup>

In modern times, universal jurisdiction has been increasingly accepted since 1935 when it was included as a basis for jurisdiction in a draft convention outlining a State's jurisdiction in criminal cases involving a foreign element.<sup>4</sup> The principle of universal jurisdiction recognizes the interest that each State has in exercising jurisdiction to combat offenses which have been internationally condemned.<sup>5</sup>

Of the few international crimes that are held out to permit assertion of universal jurisdiction by States, war crimes is without question within that category.<sup>6</sup> As acknowledged by the Restatement (Third) on the Foreign Relations Law of the United States:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . .<sup>7</sup>

#### THE FOUR GENEVA CONVENTIONS OF 1949 REQUIRE THE EXERCISING OF UNIVERSAL JURISDICTION

Although only a few of the international criminal law conventions during the last two centuries contain references that could be interpreted as providing universal jurisdiction, those that do have been either ratified by the United States or have become customary international law; most prominent among them are the treaties

<sup>2</sup>M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* 513 (1992).

<sup>3</sup>H. Grotius, *De Jure Belli Ac Pacis*, Book II, Chap. XX (1624).

<sup>4</sup>Harvard Research in Int'l Law, *Jurisdiction with Respect to Crime*, 29 A.J.I.L. 435 (Supp. 1935).

<sup>5</sup>L. LeBlanc, *The United States and the Genocide Convention* 180 (1991).

<sup>6</sup>See e.g., B. Carter & P. Trimble, *International Law* 735 (2d ed. 1995); L. Chen, *An Introduction to Contemporary International Law* 239 (1989); J.G. Starke, *Introduction to International Law* 234 (1989); I Brownlie, *Principles of Public International Law* 304-05 (1979).

<sup>7</sup>Restatement (Third) on the foreign Relation Laws of the United States §404 (1987)(hereinafter "Restatement"). See also Paust, *Universality and the Responsibility to Enforce International Criminal Law*, 11 Hous. J. Int'l. L. 337, 340 (1989)(universal enforcement recognized for "crimes against mankind," "crimes against the whole world" the "enemies of the whole human family" and those persons who are *hostis humani generis*).

which are the subject of this legislation. The four Geneva Conventions of 1949<sup>8</sup> all provide that:

Each [party] shall be under the *obligation* to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts.<sup>9</sup>

The four Geneva Conventions entered into force on October 21, 1950, and the United States became a party on February 2, 1956. Hence, as a result, the United States is obligated to assert universal jurisdiction with respect to violations of the four Conventions. H.R. 2587, as revised by the U.S. Departments of State and Defense, would finally implement the steps we were required to have taken forty years ago. Anything less would fall short of our international obligations and responsibilities.

Of course, adoption of this principle does not mean that the United States will be obligated to commence a prosecution each and every time a suspected war criminal is found within our territory. The United States can always seek to extradite the individual should another State request custody.<sup>10</sup> However, there may not be such a State and without this legislation, a crime may go unpunished.<sup>11</sup> Furthermore, the fact remains that it is highly unlikely that war crimes will occur within the United States in the near future or that many Americans will commit a war crime. While it is certainly possible that an American may find themselves a victim of a war crime, the most likely scenario to occur is for a suspected war criminal from another country to settle in the United States and thereafter be reported to the authorities. Without universal jurisdiction the United States will be essentially powerless to punish these individuals and must resort to extradition or deportation.<sup>12</sup>

#### THE UNITED STATES HAS SUPPORTED THE PRINCIPLE OF UNIVERSAL JURISDICTION IN BOTH INTERNATIONAL AND DOMESTIC SETTINGS

#### *The United States Has Ratified Several International Conventions Upholding Universal Jurisdiction*

Since World War Two, the United States has ratified several international conventions pertaining to criminal law that also impose the exercise of universal jurisdiction. This demonstrates not only the Executive Branch's support of universal jurisdiction, but that of the United States Senate as well.

<sup>8</sup> See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (Geneva Convention I); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (Geneva Convention II); Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (Geneva Convention III); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (Geneva Convention IV).

<sup>9</sup> Geneva Convention I, art. 49 at 3146, T.I.A.S. No. 3362 at 34, 75 U.N.T.S. at 62 (emphasis added); Geneva Convention II, art. 50, at 3250, T.I.A.S. No. 3363 at 34, 75 U.N.T.S. at 116 (emphasis added); Geneva Convention III, art. 129, at 3418, T.I.A.S. No. 3364 at 104, 75 U.N.T.S. at 236 (emphasis added); Geneva Convention IV, art. 146, at 3616, T.I.A.S. No. 3365 at 102, 75 U.N.T.S. at 386 (emphasis added).

<sup>10</sup> A State that captures a perpetrator of war crimes either may "surrender the alleged criminal to the state where the offense was committed, or . . . retain the alleged criminal for trial under its own legal processes." *In re List, II Trials of War Criminals (1946-1949)* at 1242 (U.S. Mil. Trib.—Nuremberg 1948).

<sup>11</sup> "[T]here is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity." Cowls, *Universality of Jurisdiction over War Crimes*, 33 Calif. L.Rev. 177, 194 (1945).

<sup>12</sup> This has prompted one commentator to note that "[b]y deporting war criminals or criminals against humanity, the United States expresses its moral disapproval of their crimes, but does little to deter them. Neither does it discourage a fugitive criminal from seeking a safe haven in this country, especially when, if he were caught, he could at best choose the country to which he would be deported and at worst delay his deportation or extradition through long judicial processes." Note, *U.S. Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience*, 29 Va. J. Int'l. L. 887, 934-35 (1989).



The 1982 United Nations Convention on the Law of the Sea at Article 105,<sup>13</sup> which is identical to article 19 of the 1958 Convention on the High Seas<sup>14</sup> provides that.

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The Courts, of the State which carried out the seizure may decide upon penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties action in good faith.

The international conventions on torture,<sup>15</sup> hostage taking,<sup>16</sup> hijacking and sabotage of aircraft<sup>17</sup> and crimes against internationally protected persons<sup>18</sup> all contain provisions, with minor variation, requiring the assertion of universal jurisdiction.<sup>19</sup> For example, Article 8(a) of the 1979 Hostage Convention states:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of the State.

Although the Genocide Convention<sup>20</sup> maintains its explicit jurisdictional base on the territoriality principle,<sup>21</sup> the crime of genocide may be prosecuted based on universal jurisdiction as a matter of customary international law. Support for this proposition includes *The Eichman Case*<sup>22</sup> and the Restatement (Third) of the Foreign Relations Law of the United States.<sup>23</sup> The United States implemented its obligations under the Genocide Convention when it enacted the Genocide Convention Implementation Act of 1988 (the Proxmire Act).<sup>24</sup> Unfortunately, the Act only follows the territoriality and nationality principled of jurisdiction. As I have suggested below, since the opportunity is now before this Honorable Subcommittee to allow universal jurisdiction for the prosecution of war crimes, we should take this one step further and permit the same for the crime of genocide.<sup>25</sup>

<sup>13</sup> United Nations Convention on the Law of the Sea, done in Montego Bay, 10 December 1982, reprinted in *The Law of the Sea*, U.N. Doc. A/CONF. 62/122.

<sup>14</sup> Convention on the High Seas, done 29 April 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

<sup>15</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, reprinted in 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), at art. 7(1).

<sup>16</sup> International Convention Against the Taking of Hostages, 4 December 1979, U.N.G.A. Res. 34/146, 34 U.S. GAOR Supp. (No. 39), U.N. Doc. A/C. 6/34 L. 23, reprinted in 18 I.L.M. 1456 (1979), at art. 8(1).

<sup>17</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, 22 U.S.T. 1641, T.I.A.S. 7192, 860 U.N.T.S. 105, reprinted in 10 I.L.M. 133 (1971), art. 7; Convention for the Suppression of Unlawful Acts Against the Safety of U.N.T.S. 177, reprinted in 10 I.L.M. 1151 (1971), art. 7.

<sup>18</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167, G.A. Res. 3166, 27 U.N. GAOR Supp. (No. 10), U.N. Doc. A/Res/3166 (1974), art. 7.

<sup>19</sup> The Convention on the Suppression and Punishment of Apartheid, adopted 30 November 1973, 1015 U.N.T.S. 243, adopted by G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/Res/3068 (1973), reprinted in 13 I.L.M. 50 (1974) also has a similar provision, although universal jurisdiction is permissive rather than mandatory. Persons charged with the crime of apartheid "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal. . . ." *Id.* art. 5, at 246. The United States is not a party to this Convention.

<sup>20</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 U.N.T.S. 277 (1948).

<sup>21</sup> "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." *Id.* at Article 6.

<sup>22</sup> "[T]he reference in Article 6 to territorial jurisdiction is not exhaustive. Every sovereign State may exercise its existing powers within the limits of customary international law . . . ." *Attorney Gen. of Israel v. Eichmann*, 36 I.L.R. 18, 39 (1st Dist. Ct.—Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (1st Sup. Ct. 1962).

<sup>23</sup> Restatement, *supra* note 7, at § 404.

<sup>24</sup> 18 U.S.C. § 1091 *et seq.* (1994).

<sup>25</sup> I also support the suggestions of the U.S. Department of State to apply this legislation to non-international conflicts and Protocol II to the Convention on Conventional Weapons. The

### *United States Courts Have Recognized The Application Of Universal Jurisdiction*

During the 1980s, several federal courts, both in the criminal and civil context, have recognized or acknowledged universal jurisdiction over acts of terrorism, torture and war crimes.<sup>26</sup> For example, in *United States v. Layton*,<sup>27</sup> which involved the prosecution of an individual for the terrorist shooting of a United States Congressman in Guyana, the Court held that "nations have begun to extend [universal] jurisdiction to . . . crimes considered in the modern era to be as a great a threat to the well-being of the international community as piracy."<sup>28</sup>

Of course, the penultimate example of universal jurisdiction is widely held to be that of the International Military Tribunal (IMT) established by the United States, Great Britain, France and Soviet Union following the victory over Nazi Germany.<sup>29</sup> However, "while many sources view the IMT's proceedings as being partly based on the universality principle, the IMT's judgement and records actually evidence little or no explicit reliance on universal jurisdiction,"<sup>30</sup> The subsequent war crimes trials held by United States military tribunals offered more explicit references to universal jurisdiction.<sup>31</sup> Consider the following statements by several U.S. military courts sitting in judgment of Nazi war criminals:

An international crime is . . . an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.<sup>32</sup>

[Jurisdiction exists regardless of the nationalities of the defendants and their victims and] of the place where the offense was committed, particularly where, for some reason, the criminal would otherwise go unpunished.<sup>33</sup>

A war crime . . . is not a crime against the law or criminal code of any individual nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation.<sup>34</sup>

former position certainly reflects the current views of the international community as it is being applied to the prosecution of war crimes in the former Yugoslavia.

<sup>26</sup>See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984)(per curiam)(Edwards, J., concurring)(voting to dismiss the action, but making several references to domestic jurisdiction over extraterritorial offenses under the universality principle), *cert. denied*, 470 U.S. 1003 (1985); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2nd Cir. 1980)(analogizing the defendant, a Paraguayan official accused of committing torture, to a pirate and slave trader); *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988)(jurisdiction proper over defendant prosecuted for hijacking and destruction of civilian aircraft under, *inter alia*, universal jurisdiction); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F.Supp. 246, 254 (D.D.C. 1985)(referring to the "concept of extraordinary judicial jurisdiction over acts in violation of significant international standards . . . embodied in the principle of 'universal' violations of international law"); *In Re Demjanjuk*, 612 F.Supp. 544, 555 (N.D. Ohio)(holding that Israel's jurisdiction to prosecute alleged Nazi guard "conforms with the international law principle of 'universal jurisdiction'"), *aff'd sub nom. Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *United States v. Layton*, 509 F.Supp. 212, 223 (N.D.Cal.)(recognizing universal jurisdiction to define and punish terrorist attacks against internationally protected persons), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981). See also the Alien Tort Statute, 28 U.S.C. §1350 (1988)(allowing U.S. courts to assert universal jurisdiction over aliens who have violated the law of nations).

<sup>27</sup>509 F.Supp. 212, 223 (N.D.Cal.), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981).

<sup>28</sup>*Id.* at 223.

<sup>29</sup>The Allies established the IMT through the London Agreement, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280, which later annexed the Charter of the International Military Tribunal, 59 Stat. 1546, E.A.S. No. 472, 82 U.N.T.S. 284.

<sup>30</sup>Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 807 (1988).

<sup>31</sup>At least one scholar has stated that the postwar tribunals established "war crimes as the chief example of the modern application of the universality principle." Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen*, 15 Loy. L.Rev. 43, 53 (1968). See also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985)(it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdictions.), *cert. denied*, 475 U.S. 1016 (1986).

<sup>32</sup>*In re List*, 11 Trials of War Criminals (1946-1949) at 757 (U.S. Mil. Trib.—Nuremberg 1948).

<sup>33</sup>*Hadamar Trial*, 1 United Nations War Crimes Commission, Law Reports of Trials of War Criminal at 46 (U.S. Mil. Comm'n—Wiesbaden 1945).

<sup>34</sup>*In re Eisentrager*, 14 United Nations War Crimes Commission, Law Reports of Trials of War Criminals at 15-16 (U.S. Mil. Comm'n—Shanghai 1947).

# UNIVERSAL JURISDICTION HAS BEEN EXERCISED CRIMINALLY BY SEVERAL UNITED STATES' ALLIES

Several key allies of the United States—Israel, United Kingdom, Canada, Australia and Ireland—have allowed prosecutions based on universal jurisdiction and, particularly within the last few years, have enacted additional legislation permitting the prosecution of future war crimes. This demonstrates the growing trend toward ensuring that perpetrators of war crimes not go unpunished, regardless of where the underlying act may have taken place.

## Israel

The trial of Adolph Eichmann under Israel's Nazis and Nazi Collaborators (Punishment) Act<sup>35</sup> provides a clear example of a State's reliance on the universality principle for prosecution of a war criminal. The district court rationalized its decision on the basis that:

[t]he abhorrent crimes defined in this law are crimes not under Israel law alone. These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("delicta juris gentium"). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial.<sup>36</sup>

## United Kingdom

In the *Almelo Trial*<sup>37</sup> of 1945, this British prosecution of German defendants was based in part on universal jurisdiction under which "every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offense was committed." The following year, a British military court in the *Zyklon B Case*<sup>38</sup> also based its case in part on the universal jurisdiction of States to prosecute war criminals.

The United Kingdom enacted legislation in 1991 which permitted the prosecution of Nazi war criminals and, just last year, Britain passed additional implementing legislation pertaining to the Geneva Conventions.<sup>39</sup>

## Australia

The Australian War Crimes Amendment of 1988<sup>40</sup> permits prosecution of Nazi war criminals who committed crimes between September 1, 1939 and May 8, 1945. The Australian definition of war crimes encompasses both war crimes and crimes against humanity as they are defined in the IMT. Although the Act was limited the time to the World War Two period, it nevertheless is based on the universality principle as it applies to crimes committed outside of Australia, and by and against people with no connection to Australia.

In 1991, Australia enacted additional implementing legislation with respect to the Geneva Conventions.

## Canada

In 1987, Canada passed An Act to Amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act<sup>41</sup> which provides that any person who commits a war crime or crime against humanity "shall be deemed to [have] committ[ed] that [crime] in Canada at the time of the act or omission, if the crime, if committed in Canada, would constitute an offence against the laws of Canada in force at [that] time."<sup>42</sup> Although the statute was enacted amid cries to prosecute Nazi war criminals, the language of the statutes also provide deterrent value for its allows for the prosecution of past, present and future war criminals.

<sup>35</sup> Law No. 64, 4 Laws of the State of Israel 154 (5710-1949/50), reprinted in *United Nations, 1950 Y.B. on Human Rights* 163.

<sup>36</sup> Attorney General of *Isr. v. Eichmann*, 36 I.L.R. 18, 26 (Isr. Dist. Ct.—Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962).

<sup>37</sup> 1 United Nations War Crimes Commission, Law Reports of Trials of War Criminals at 35 (Brit. Mil. Ct.—Almelo 1945).

<sup>38</sup> 1 United Nations War Crimes Commission, Law Reports of Trials of War Criminals at 93 (Brit. Mil. Ct.—Hamburg 1946).

<sup>39</sup> Ireland has also passed implementing legislation.

<sup>40</sup> War Crimes Amendment Act, § 9, 1989 Aust. Acts 926; 119 Parl. Deb., S. 497 (1987).

<sup>41</sup> Act to Amend the Criminal Code, ch. 37, 1987 Can. Stat. 1107.

<sup>42</sup> *Id.* at § 1.91, 1987 Can. Stat. at 1109.

Additional legislation was enacted in 1990 to allow for universal jurisdiction based on the Geneva Conventions.

#### SUGGESTED MODIFICATIONS TO H.R. 2587

Although the proposed legislation is a tremendous step towards the United States fulfilling its international obligations, there are additional steps that should be taken at this time to further strengthen the enforcement of international law as well as ensure the utmost protection of American interests. These changes include amending the bill to provide for: (a) the non-application of the death penalty in instances where the United States is seeking the extradition of a suspected war criminal from a State that opposes the imposition of the death penalty; (b) the ability of Americans to pursue civil remedies against suspected war criminals; and (c) universal jurisdiction over crimes of genocide.

#### *Non-Application of the Death Penalty in Certain Instances*

Both the original version of H.R. 2587 and the revisions suggested by the U.S. Departments of State and Defense provide for the possible imposition of the death penalty to the perpetrator should death result to the victim of a war crime. In the United States imposition of the death penalty is commonly included as a possible penalty in offenses that would be deemed analogous to this statute.<sup>43</sup> However, as is well known, most nations of the world oppose the death penalty and would refuse to extradite a suspected war criminal to the United States for trial based on, among other reasons, the possibility that the individual might be sentenced to death and, in the interim, languish on death row for many years.<sup>44</sup>

Imagine a situation where an American, whether a civilian or a member of our Armed Forces, was killed as a result of a war crime committed in another country and a prime suspect is in custody of the foreign power. Here exists a scenario where the United States interests to prosecute the individual are obviously heightened. Yet, because of the possibility that the death penalty may be imposed as a sentence, the custodial state may well refuse to extradite the accused. American justice will not be adequately served in a case of this type.

Therefore, I would propose that the statute be amended to provide that in instances where the United States seeks the extradition of an individual suspected of committing a war crime from a State whose laws, or the extradition treaty in force, prohibits the extradition of the individual due to the possible sentence of death, the death penalty will not be applied in such cases. It would seem that the interests of the United States lie in seeing the individual prosecuted to the fullest extent possible under our laws, even if absent the death penalty, rather than seeing the individual receive a lesser sentence or none at all in the custodial state.

#### *Civil Remedies Must Be Created For The American Victims of War Crimes*

Oftentimes, in prosecuting alleged violators of horrific crimes we sometimes forget or neglect the victims and their families who have suffered terribly. It should be recognized that there exists twin pillars to attaining justice punishment of the perpetrator and securing compensation for the victim and/or their family. I have witnessed firsthand the need for parallel remedies during my representation of families of the victims of the terrorist bombing of Pan Am Flight 103. Recently, I had the great satisfaction of having participated in drafting substantial portions of the amendment of the Foreign Sovereign Immunities Act of 1976<sup>45</sup> that was signed into law by President Clinton in April of this year as part of the "Antiterrorism and Effective Death Penalty Act of 1996."<sup>46</sup> This amendment now permits victims of aircraft sabotage, torture, hostage-taking and extrajudicial killing to sue those foreign governments responsible for their losses.<sup>47</sup>

<sup>43</sup> See e.g., Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 97-399 § 1202, 100 Stat. 853 (1986), codified at 18 U.S.C. § 2331 *et seq.* (certain terrorism offenses).

<sup>44</sup> For example, in 1989, the European Court of Human Rights refused to extradite an accused murderer to the United States because the court found the prospect of eight years on death row, due to the nature of appeals in this country, should he be sentenced to death, would be "inhuman or degrading treatment or punishment." *The Soering Case*, 28 I.L.M. 1063 (1989).

<sup>45</sup> 28 U.S.C. §§ 1602 *et seq.* (1988).

<sup>46</sup> H.R. Rep. No. 518, 104th Cong., 2d Sess. (1996).

<sup>47</sup> The amendment creates Section 1605(a)(7) of Title 28 of the United States Code and permits jurisdiction for lawsuits against terrorist states. Prior to the passage of this amendment, cases against foreign states for terrorist acts or other violations of the law of nations committed outside of the territory of the United States against Americans were dismissed for lack of jurisdiction. See e.g., *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994), *cert. denied*, —U.S.— (1995) (No jurisdiction existed over Iran for holding Americans hostage); *Smith*

With respect to civil remedies, the prosecution of an alleged war criminal in the United States for acts committed abroad under this legislation may have the unwelcome effect of providing alien victims and their families with greater rights than their American counterparts. Aliens that have suffered injury as a result of a war crime committed abroad may initiate a civil action against their perpetrator when the individual is found within the United States under the Alien Tort Statute<sup>48</sup> which provides district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>49</sup> In recent years, several successful actions have been instituted in the United States against foreign perpetrators of torture, war crimes and genocide by their foreign victims and/or surviving family members.<sup>50</sup>

Of course, war crimes both violate the law of nations and treaties of the United States, therefore providing aliens with a civil remedy should the alleged war criminal be brought to or found within the United States. However, no such right exists for American victims or their families. Although American victims can seek civil remedies under the Torture Victim Protection Act of 1991,<sup>51</sup> the Act only encompasses acts of torture or extrajudicial killing, thereby excluding many other acts that fall within the definition of war crimes. As it was obviously never the intent to grant aliens greater rights than American victims of war crimes, I would implore this Subcommittee to fill this accidental vacuum.

#### *Universal Jurisdiction Should Be Provided for Crimes of Genocide*

Under the Proxmire Act, the United States claims the right to try persons for committing genocide and related acts only on the basis of the nationality and territoriality principles of jurisdiction. Thus, as the law now stands, alleged perpetrators of genocide such as Radovan Karadzic or Ratko Mladic could not be prosecuted in the United States for these atrocities. However, as explained above, although the Genocide Convention does not obligate nations to assert universal jurisdiction, crimes of genocide can be prosecuted based on universality as a matter of customary international law.

Given the legislation being proposed today, it would seem farcical to provide universal jurisdiction with respect to war crimes, yet maintain the jurisdictional limitations imposed by the Proxmire Act on crimes of genocide. Therefore, this Subcommittee should consider including within its proposed bill the appropriate clarifying amendment.

#### CONCLUSION

Mr. Chairman, the cries of "Never Forget" that arose out of the ashes of the six million murdered in the Holocaust are sadly being drowned out by the millions of innocents still falling victim to war crimes and acts of genocide throughout the world. In ensuring that we "Never Forget" those that have been victimized by such atrocities, we must strive to "Always Prosecute" those that caused such unjustified and inexcusable suffering. H.R. 2587, with the suggested revisions proposed herein, will serve to accomplish just that and perhaps send a message to those who are contemplating committing such atrocities that the United States will never allow its territory to serve as a safe haven for them.

Perhaps one day soon a permanent international criminal court will exist that will be in a position to prosecute suspected war criminals. But that day has not yet arrived and in the interim war criminals are not wasting any time to continue their slaughter of innocent victims. By enacting this legislation the United States will continue to help lead the international community towards an end to this madness or, at the very least, to ensure that justice rises from the aftermath.

Thank you for the opportunity to present my views on this matter. If requested, I would be happy to assist the Subcommittee in drafting the language necessary for the amendments I suggested above.

Mr. SMITH. Thank you, Mr. Zaid.

v. *The Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995)(Victims of Pan Am Flight 103 were without jurisdiction to seek civil remedies against Libya).

<sup>48</sup> Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), codified at 28 U.S.C. § 1350 (1988).

<sup>49</sup> *Id.*

<sup>50</sup> See e.g. *Doe v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995)(Action against Serbian leader for genocide, war crimes against humanity); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980)(Action against Paraguayan official accused of torture); *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. April 9, 1996)(Action against Rwandan political leader for massacre of thousands).

<sup>51</sup> Pub. L. No. 102-2567, 106 Stat. 73 (1992), codified at 28 U.S.C.A. § 1350 note.

Judge EVERETT, before I direct my first question to you, may I ask who was chairman of the Senate Judiciary Committee when you served as counsel? I'm just curious about the historical—

Judge EVERETT. Well, I was actually primarily serving with the Subcommittee on Constitutional Rights, of which Senator Ervin was the Chair.

Mr. SMITH. Is that right?

Judge EVERETT. And so he was the one that I had continuing contact with during that period of time. And, as I recall, there was a succession of—there were a couple of Chairs for the full Judiciary Committee, but my work was primarily with Senator Ervin.

Mr. SMITH. Thank you.

Judge EVERETT, both you and Mr. Zaid have opposed a possible death penalty provision in this bill. I am just curious, Do you oppose or support the death penalty in other circumstances?

Judge EVERETT. I have no problem with it whatsoever. I do support it in other circumstances.

Mr. SMITH. OK.

Judge EVERETT. As I say, I've written an opinion—

Mr. SMITH. Right.

Judge EVERETT [continuing]. Upholding it. There's one other practical problem that I thought of during the testimony today that will exist if there is a death penalty. That is that, well, put it this way: article 134, which applies to service members, has a third clause which incorporates by reference all crimes and offenses not capital, which means that anything in the Federal Code which is not capital can be tried by a court-martial if a service member is involved. If there is a capital offense authorized, I fear that it might have the practical effect of ousting court-martial jurisdiction that would otherwise exist, and I think that would be a very important and unfortunate byproduct. It's a technical point, and at the very least I would hope that would be dealt with somewhere along the line, because it would be unfortunate to deprive courts-martial and military commissions of an opportunity to try cases where they might be the only really realistic forum that could be used.

Mr. SMITH. Judge Everett, let me ask you a question that I asked a member of the first panel, but I just want to have repeated again. Do you have any worry that enactment of H.R. 2587 would encourage rogue nations such as Iran and Libya to seize Americans and prosecute them for so-called war crimes? You heard the previous response, but I want to get your response.

Judge EVERETT. I think that's a very accurate response.

Mr. SMITH. OK.

Judge EVERETT. They're going to do their own thing. I think, on the other hand, our having jurisdiction may protect us in situations where we need to be able to say we want to deal with our people; we don't want to surrender them to an international court or to extradite them somewhere else.

Mr. SMITH. Thank you.

Mr. Leigh, I also have a repeat question for you. This goes to something that you mentioned a while ago. The United States is a strong supporter of the International Criminal Tribunal for the former Yugoslavia which was established by the U.N. Security Council to prosecute war criminals from the Yugoslavian civil war.

Are such international tribunals appropriate venues for dealing with war crimes or more appropriate than domestic criminal law or not?

Mr. LEIGH. Well, I think they're highly appropriate for the particular situation in Yugoslavia, but a lot of considerations go into establishing a special and temporary tribunal of this sort.

Mr. SMITH. To handle the numbers that—

Mr. LEIGH. There must be enough funding. There has to be enough staffing to really do the job that needs to be done. And I think it's clear, as Mr. Matheson said, that there are going to be far more crimes of this sort than a particular ad hoc international tribunal could handle.

Mr. SMITH. So it's an appropriate venue—

Mr. LEIGH. It needs to be national—

Mr. SMITH. It's an appropriate venue, in other words; you just need to make sure that it's capable of processing the individuals?

Mr. LEIGH. That's right.

Mr. SMITH. OK. Another question for you, Mr. Leigh. Can there be instances when prosecutions of individuals for war crimes interferes with peace initiatives and the reconciliation of warring parties? I know that's a little bit of a hypothetical, but with all your experience you probably—

Mr. LEIGH. Well, there are many people that are saying that.

Mr. SMITH. Yes.

Mr. LEIGH. I don't share that view at this time. I think, at any rate, that as far as this legislation is concerned, we should be prepared to do what we need to do. And it seems to me that some of the assumptions made in 1955 as to what we could do have proven unsustainable, by virtue of Supreme Court decisions as to the trial of civilians, as to the trial of people who have been discharged from military service. So there is a gap here.

And I think also the alternative of extradition is not really a terribly good one. I think we ought to be able to do everything that we need to do in this country.

Mr. SMITH. Thank you, Mr. Leigh.

Mr. Zaid, what was your response to my question about the death penalty? Do you support it in other circumstances or are you opposed to the death penalty—

Mr. ZAID. I have no problem with the death penalty, Mr. Chairman. It's used in several analogous statutes, like the terrorism statutes, for instance.

Mr. SMITH. OK.

Mr. ZAID. The problem arises, where the American interest is so great, we would rather have the person prosecuted here—

Mr. SMITH. Right.

Mr. ZAID [continuing]. Rather than allow them to be prosecuted elsewhere.

Mr. SMITH. I understand that. I just was checking for bias; that's all. [Laughter.]

Mr. ZAID. No, no bias.

Mr. SMITH. I do have another question, Mr. Zaid. A number of other countries, such as the United Kingdom, have enacted penal legislation implementing the Geneva Conventions. Have there ever

been any prosecutions under these statutes? I suspect there's only been a few, if any, but—

Mr. ZAID. I know in England and Canada and Australia there were attempts for prosecutions of Nazi war criminals. I'm not aware of any prosecutions of other war criminals. They have predominantly been unsuccessful, but that is because of the evidentiary problems surrounding the passage of time more than anything else.

Mr. SMITH. Would you say that the statutes are symbolic or not?

Mr. ZAID. No, they very well could have teeth, particularly in these countries where—

Mr. SMITH. If you had the evidence?

Mr. ZAID. If you have the evidence, and, of course, many times these countries, as our country does, these individuals find their way here. The 1980's saw quite a few. In fact, just last month there was another case up in New York of torturers that were sued civilly by their victims who happened to find themselves in the same neighborhoods. So, with this statute in hand, we could do more than just civilly prosecute them; we could criminally prosecute them.

Mr. SMITH. OK. Thank you, Mr. Zaid.

The gentleman from Florida is recognized, Mr. McCollum.

Mr. MCCOLLUM. Thank you very much.

Mr. Zaid, I find your suggestion with regard to the death penalty to be interesting in that you don't just propose we don't have one for these crimes, but you propose that, if I read your testimony and heard it correctly, that we have a provision that would say, where somebody is suspected of committing one of these crimes and there is an extradition process required to get them before our courts, and that country prohibits the death penalty, that we provide that the death penalty shall not apply. Perhaps we can do that. Does that present any problems, in your judgment—and I'd be curious if anybody else thinks it does or doesn't—with respect to constitutionality of the death penalty being applied in other cases, if we were to make that kind of an exception for those situations? I mean other cases involving this law.

Mr. ZAID. I certainly would not hold myself out to be a constitutional lawyer, but certainly the imposition of the death penalty has always been a discretionary function of the prosecutors, and I don't believe there's a constitutional balance to determine when, in what instance it's applied, and when it might not be in the other, even if it's the same crimes—

Mr. MCCOLLUM. Well, you're probably right, but I'm just concerned, if we actually codify that as opposed to leaving it to prosecutorial discretion, but obviously your concern would not be fully addressed if we didn't codify it because the question is, what does the other country think of that, though I suppose we could always strike a deal. It seems to me that seems to be self-evident with respect to international relations. We could have the death penalty on the books, and if we tell country X, Y, or Z we're not going to seek it—and I suppose that depends on whether they believe we aren't going to seek it.



Mr. ZAID. That may be, Mr. McCollum. The type of situation that I'm getting at here to show where our interest is, let's take, for example, the *Achille Lauro* hijacking—

Mr. MCCOLLUM. *Right.*

Mr. ZAID [continuing]. And we were unable to secure custody over the perpetrators, and they were prosecuted by Italy, and several of them were let go early and one most recently. If in that instance we had been able to secure custody over them, those people would be secure in our jails for quite a long time with no possibilities of getting out. I'd rather see that happen than argue over imposing the death penalty versus them serving a lighter sentence abroad.

Mr. MCCOLLUM. We faced a similar decision or two relative to laws we passed here not too long ago on terrorism, and so forth. So I understand the argument; I'm just curious about the constitutional question.

Judge, do you have any comment about whether the proposal of Mr. Zaid to carve out a statutory exception to the death penalty in those extradition cases might be interpreted negatively toward the application of it in the other cases which would be tried under such a law?

Judge EVERETT. I'd go all or nothing. I think by introducing that distinction, it would create a legal hurdle later on. I noticed in the case the Supreme Court handed down last week on capital punishment for the military that they introduced a very—there were four Justices who had a very unique distinction applicable to capital offenses. And if you have anything they could play with, as, for example, equal protection or something of that sort, I think it would mean that probably the capital punishment would not be enforced anyway; there would be some legal difficulties. So I would suggest either leave it in or take it completely out.

Mr. MCCOLLUM. All right. Let me ask for a clarification. Mr. Zaid, you have suggested that we need to repeal, if you will, a limitation imposed by the Proxmire Act on crimes of genocide. I'm a little confused about the term "universality." Does the proposal to make the application of this law that we're dealing with, and what Mr. Jones wants to do, encompass or not encompass genocide? I mean, if we do what the State Department is suggesting, and what I believe, Judge Everett, you would embrace, do we cover crimes of genocide generally or is this broader, what Mr. Zaid is proposing, that we specifically have to repeal the Proxmire Act? Does anybody here know? Mr. Zaid.

Mr. ZAID. Well, I think there is some overlap between war crimes and genocide, but they have been considered to be separate offenses, particularly in the last few decades. The International Criminal Court, the jurisdiction that it would be holding, were it to be created as promoted by the United States, sees genocide and war crimes as separate offenses. So we face a distinction or the problem here of, if Mladic or Karadzic ended up in the United States, we would not be able to prosecute them for genocide, but yet an individual could be prosecuted for war crimes.

Mr. MCCOLLUM. What's the history behind why the Proxmire Act limited the jurisdiction; do you know?

Mr. ZAID. Well, the Genocide Convention, in fact, was not mandatory in the imposition of universal jurisdiction. So here you have a significant difference where the Geneva Conventions do impose mandatory obligations of state parties.

There was a long, long debate that goes back many years, which I'm sure Mr. Leigh participated in rather than me just reading about. So maybe he might be able to elaborate on it.

Mr. McCOLLUM. Well, the bottom-line reason for the question is not so much to get the history, though I would enjoy hearing it. I enjoyed Mr. Leigh earlier telling us that. I find that to be one of the more fascinating parts of considering this bill.

But I am concerned about where the objections might lie and what kind of pitfalls we're in. I don't want—I'd like to expand this bill, to be very frank, to go as far as we can go relative to the suggestions that several of you made, including the State Department, but, on the other hand, I don't want to jeopardize Mr. Jones' bill by putting it out there so that it's going to get fired at by somebody over in the Senate who is going to say this is such a radical proposal, I'll sit on it. The Senators, as Judge Everett well knows, with about 2 months to go, have no problem at all stopping a bill.

So the question—and I'll leave it at this, but I think it is important, Mr. Chairman—is: is there anything in that proposal or any of these other suggestions that any of you see that you think raise red flags where someone is likely or probably going to come forward and raise some opposition to it, to this bill, if we put it in there under current conditions? And, again, I know the history, Mr. Leigh, but I'm looking at it as it exists today.

Judge, do you want to comment on that?

Judge EVERETT. I think one of the good things about it is the administration is backing it, apparently, wholeheartedly, and I don't think they could walk away from it. And I think if there is no concerted opposition there, that the broadening of jurisdiction by the committee would not encounter trouble. It's hard to predict. Obviously, someone may have a special concern. But there seems to be such logic in broadening the jurisdiction, so that our courts can deal with the problem, and it may actually protect the rights of our own citizens.

Mr. McCOLLUM. Right.

Judge EVERETT. I think that's a good selling point. So that I think, on balance, there are advantages. I would hate to do anything that would jeopardize the success of Congressman Jones' bill, believe me. So I had some hesitation in even suggesting a broadening of jurisdiction, and yet it seems quite logical to provide as broad a jurisdiction as possible for our courts.

Mr. McCOLLUM. Well, I didn't ask the question I should have of the State Department with respect to genocide. We'll ask that separately, and I know that that testimony's passed, but other than that, it doesn't look like there's anything here anyway.

Mr. Leigh, do you see anything, any roadblocks, impediments to expanding this jurisdiction, as is—

Mr. LEIGH. Well, I was a minimalist in 1955. I'm still more minimal than my colleagues on either side. I would go as far as the State Department wants to go, but I think if you're trying to get

a bill this year, it seems to me there's something to be said for confining it within those limits.

I would like to point out also that the one reservation that the United States made to these Conventions was the one that had to do with the death penalty, and we and the United Kingdom, and various other countries, made a reservation to article 68 which freed us to apply the death penalty, if we chose to.

Now on the question of whether it would interfere with our ability to secure extradition, it seems to me that that's easily handled. At the time the United States requests extradition, it can certify that it is not going to try for a capital offense—it has to say what the charges will be, and so the charges can be made noncapital, so the death penalty would not be involved. So it seems to me there's an area of discretion here which you don't need to anticipate in the statute.

Mr. MCCOLLUM. Mr. Zaid.

Mr. ZAID. I would think if anyone has a problem with this particular bill, they might still have a problem with genocide. It would go hand in hand. I would have trouble rationalizing why someone would support universal jurisdiction over a crime such as war crimes and not support it over genocide. The historic debate surrounding why it was limited had a great deal to do with whether it was going to be applied to U.S. servicemen. The debate came up quite a deal during the Vietnam era, and, in fact, in the early seventies Justice William Rehnquist testified, when he was an official at the Justice Department, that, in fact, even by expanding it then at that point, that it really would have no effect on what would occur to our servicemen abroad. If a serviceman commits an act of genocide in another country, that country will always have jurisdiction over that individual because of the territoriality principle.

So, honestly, I would not envision someone having difficulty with genocide that's apart from the difficulty that they might have with war crimes.

Mr. MCCOLLUM. Well, Mr. Chairman, the only thing I would ask—and I certainly went over my time—is that if we could get a comment from the State Department, before we mark this up, on the genocide question.

Thank you.

Mr. SMITH. Thank you, Mr. McCollum. We will do so.

[The information follows:]



United States Department of State

Washington, D.C. 20520

JUL 15 1996

Dear Mr. McCollum:

I am writing in response to your question, posed following the June 12, 1996, testimony of Administration officials before the Immigration and Claims Subcommittee of the Committee on the Judiciary on H.R. 2587, the War Crimes Act of 1996. You asked whether the Department of State would support extending U.S. criminal jurisdiction over genocide.

The Administration's suggested revisions to the War Crimes Act are intended to ensure that the United States has the domestic legal authority to meet its obligations under international law. As noted in the State Department's prepared statement at the June 12 hearing, for example, it is our view that it would be useful to establish clear jurisdiction even over persons who commit grave breaches of the Geneva Conventions outside the United States if they are later found in the United States, as the Geneva Conventions require. Similarly, since 1949 the United States has accepted certain specialized rules of international humanitarian law which may not have an equivalent in existing U.S. criminal statutes.

With respect to genocide, United States law currently provides authority even beyond that required by the U.N. Convention on the Prevention and Punishment of the Crime of Genocide. Federal law makes genocide a crime if it is committed within the United States or by a United States national. See 18 U.S.C. § 1091. The Genocide Convention only requires prosecution of crimes committed within one's territory; it does not require the establishment of jurisdiction over genocide committed outside the United States by non-nationals who are later found within one's territory. Genocide is thus on a very different footing than war crimes. The proposed legislation expanding jurisdiction over war crimes could be important to ensuring that our international obligations are fulfilled, but additional legislation on genocide would be entirely a unilateral, domestic initiative.

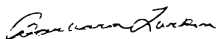
The Honorable  
 Bill McCollum,  
 Subcommittee on Immigration and Claims,  
 Committee on the Judiciary,  
 House of Representatives.

- 2 -

Although expansion of jurisdiction over genocide committed outside the United States by non-U.S. nationals warrants further serious consideration, in view of the short legislative calendar remaining in this Congress, the Department of State would not propose such expansion at this time.

Please do not hesitate to contact us if you have additional questions or believe that we may be of further assistance.

Sincerely,



Barbara Larkin  
Acting Assistant Secretary  
Legislative Affairs

Mr. SMITH. And thanks again for your contributions today. I knew you were a man of many interests and talents; I didn't know you had expertise on this subject, which is the first time it's come before this subcommittee. So I thank you for your contributions.

Let me also thank Congressman Jones. If it were not for him, as I said earlier, we would not be here today. If it were not for the idea presented to him by Captain Cronin, we would not be here today. So we thank you, Walter, for your participation, as well as for your interest in such an important subject.

Let me thank the panelists for contributing their expertise today.

This will conclude our hearing today, but we thank everyone who participated. And this subcommittee stands adjourned.

[Whereupon, at 4:25 p.m., the subcommittee adjourned.]

## APPENDIXES

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### APPENDIX 1.—LETTER DATED JUNE 17, 1996, FROM JUDGE ROBINSON O. EVERETT, U.S. COURT OF APPEALS FOR THE ARMED FORCES



*United States Court of Appeals  
for  
The Armed Forces*

450 E Street, Northwest  
Washington, D.C. 20442-0001

Tel: (202) 761-1448  
FAX: (202) 761-4672

June 17, 1996

George M. Fishman, Esq.  
Assistant Counsel, Subcommittee on  
Immigration and Claims  
House Committee on the Judiciary  
Washington, DC 20515

RE: H.R. 2587

Dear George:

In our conversation today, I told you that I would be glad to suggest language to effectuate the additions to H.R. 2587 that I suggested during my testimony before the Subcommittee on June 12, 1996. I must acknowledge that my ability to draft statutes is far less than when I served as a counsel for Senator Ervin; but I hope that the following suggestions will be of some assistance:

- (1) To implement my first proposal, I would suggest use of this language:

"Enactment of this Law shall not repeal or diminish in any way the jurisdiction of any court-martial, military commission, or other military tribunal under Articles 18 and 21, 10 U.S.C. secs. 818, 821, or any other Article of the Uniform Code of Military Justice, or under the law of war or the law of nations."

Secondly, I would substitute for "citizens" whenever it appears the words "national, as defined by (with statutory appropriate reference)."

Third, I would include language stating that "A war crime, as defined herein, shall be punishable (a) if the perpetrator or the victim is a servicemember or national of the United States; (b) if the perpetrator is found within the United States or within its special maritime and territorial jurisdiction; or (c) if the Attorney General certifies that it is in the national interest of the United States that the war crime be tried and punished in a court of the United States."

Fourth, I would define a war crime as "conduct which constitutes a grave breach of any duty imposed by the law of war or the law of nations, as incorporated in (enumerated treaties)."

Fifth, I would amend Article 134 of the Uniform Code, 10 U.S.C. sec. 934. to add a fourth clause stating, "or any conduct which constitutes a violation of the War Crimes Act of 1996, as it may be at the enactment of this law or as it may be hereafter amended."

Sixth, I would provide: "Punishments under this act shall not be subject to the Sentencing Guidelines Act."

Seventh, I would either delete the death penalty provision entirely or would authorize the death penalty without regard to the nationality or status of the victim.

Hoping that these suggestions will be of some assistance, I  
am

Cordially,



Robinson O. Everett



## APPENDIX 2.—STATEMENT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

The International Committee of the Red Cross presents its compliments to the Chairman and Members of the Subcommittee on Immigration and Claims and expresses its appreciation for the opportunity to make a statement on H.R. 2587, entitled the "War Crimes Act of 1995".

Since its establishment in 1863, the International Committee of Red Cross has worked around the world to protect and assist the victims of armed conflict. As an independent and neutral intermediary it has been entrusted by States with a range of humanitarian tasks, and has played a key role in the development of the rules of international humanitarian law. These rules, which apply during armed conflict, are designed to prevent unnecessary suffering and to protect those affected by war including the wounded, sick, prisoners of war and civilians.

The widespread atrocities committed in recent conflicts such as those in Rwanda and the former Yugoslavia are tragically familiar. The effective implementation of international humanitarian law requires that those who commit such war crimes are brought to justice.

Governments and national courts have, and will continue to have, a key role to play in the punishment of war crimes and in ensuring that there is no haven for war criminals. The establishment of international tribunals for the former Yugoslavia and Rwanda is a valuable contribution to the suppression of war crimes, but does not diminish the importance of action at the national level. Similarly any future permanent international criminal court should complement, rather than displace, the role of national courts.

Under the Geneva Conventions of 1949 all countries are obliged to enact any legislation necessary to punish grave breaches of those conventions and to bring persons accused of such breaches before their own courts, regardless of the nationality of the perpetrator or the place of the offence. A significant number of countries adopted have such legislation including, among common law countries: Australia, Canada, India, Ireland, Kenya, Malaysia, New Zealand, the United Kingdom and Zimbabwe.

The International Committee of the Red Cross strongly welcomes H.R.2587 together with the additions proposed by the Department of State. The ICRC is also pleased to note the role of the American Red Cross in the dissemination of international humanitarian law within the United States and their expression of support for this proposal. The punishment of war crimes, wherever and by whoever they are committed, will make a vital contribution to the effective implementation of international humanitarian law.

APPENDIX 3.—STATEMENT OF ALFRED P. RUBIN, DISTINGUISHED  
PROFESSOR OF INTERNATIONAL LAW, THE FLETCHER SCHOOL OF  
LAW AND DIPLOMACY, TUFTS UNIVERSITY

FORMAL STATEMENT ON H.R. 2587

Submitted to the Subcommittee on Immigration and Claims, Committee  
on the Judiciary, United States House of Representatives, by:

Alfred P. Rubin, Distinguished Professor of International Law  
The Fletcher School of Law & Diplomacy  
Tufts University  
Medford, MA 02155  
Tel: (617) 627-3700

I represent only myself.

The invitation to present my views on H.R. 2587 to the House  
of Representatives subcommittee on Immigration and Claims of the  
Committee on the Judiciary is very much appreciated. In this case,  
I find my opinions inconsistent with what many of my most learned  
and conscientious academic and legal colleagues seem to regard as  
a consensus which they support. I am grateful for the opportunity  
to present my reasons.

For the record, I am submitting part of a "conclusions" sec-  
tion of my book, *Ethics and Authority in International Law*, now in  
the publication process at Cambridge University Press. Unfortu-  
nately, due to the timing of the invitation and the expenses that  
would be involved, I have been unable to submit to the subcommittee  
the desired number of copies of this statement and its supporting  
documentation. I regret the inconvenience that this might cause to  
the members of the subcommittee or their staffs.

H.R. 2587 has been proposed as legislation "To carry out the  
international obligations of the United States under the Geneva  
Conventions to provide criminal penalties for certain war crimes."  
It provides criminal sanctions against "Whoever . . . commits a  
grave breach of the Geneva Conventions where the victim of such

breach is [a] member of the armed forces of the United States or a citizen of the United States." Since the Uniform Code of Military Justice already provides procedures and criminal sanctions for members of the United States armed services committing war crimes, including such "grave breaches," no matter who the victim, the only notable gap in existing American law relates persons subject to the laws of war who are not subject to the jurisdiction of local territorial law or American courts martial: third country nationals in some cases, members of the armed services since discharged, civilians accompanying the armed forces, other American nationals in places where the laws of war apply and the "normal" laws of the place cannot be applied. The gap is small, but significant. The proposal does not seem to address it directly. Instead, it addresses the case in which an American or a foreign person commits a "grave breach" of one of the 1949 Geneva Conventions and the victim is an American. Jurisdiction to prescribe in such cases is generally conceived to be "universal" and jurisdiction to adjudicate would be based on the nationality of the victim.

The proposal contains no provision regarding the jurisdiction of an American tribunal to enforce United States law. If it were presumed that the normal rules regarding jurisdiction to enforce persisted, I should say the proposed legislation still leaves an unaccountable gap, but could support it. If it were interpreted to mean that jurisdiction to enforce were also "universal," I should have to bring to your attention the heavy problems that would force

me to counsel against its adoption. It does not address, nor could legislation address, the much more difficult Constitutional obstacle to American tribunals applying any law to American civilians and possibly others that does not meet the procedural standards of the Vth (or, in State courts, the XIVth) Amendment(s) to our Constitution. The notion of applying martial law, the laws of war, in appropriate circumstances is an intriguing one, but it is not clear to me that the legislation as proposed would do that or that the Congress would want it done in the absence of a declaration of war, despite the fact that for about 200 years the application of martial law and the presence of a declaration of war have been regarded as Constitutionally independent. See *Talbot v. Seeman*, 1 Cr. (5 U.S.) 1 (1801), discussed in ALFRED P. RUBIN, *WAR POWERS AND THE CONSTITUTION*, 68(2) *Foreign Service Journal* 20-23 (1991) reprinted in *Committee on Foreign Relations, U.S. Senate, 101st Cong., 2d Sess. Relations in a Multipolar World, Hearings*, 235-240, (30 November 1990).

The Department of State has responded no grappling with these issues, but with an opinion that "in order to be in compliance with our international obligations, jurisdiction should also exist when the perpetrator of any grave breach of the Geneva conventions is later found in the United States after such activity was committed" [emphasis sic]. State Department also supports expanding the "grave breaches" language to cover all "war crimes," including the

rules of international law allegedly applicable in non-international armed conflicts, the subject of Article 3 common to the four Geneva Conventions of 1949. Finally, State Department proposes that persons who plant land mines or booby traps and similar devices be treated also as war criminals "when the United State is a party to" a Protocol, amended recently to require parties to make such activity subject to national criminal sanctions.

The first of the State Department proposals solves the problem of a lack of jurisdiction to enforce by restricting the operation of the legislation to cases in which the accused is found within the United States. Unfortunately, I cannot support the rest. In my opinion, the State Department opinion mistakes the international obligations of the United States under the 1949 Geneva Conventions and general international law and, if implemented, would set a precedent that the United States would soon learn to regret.

Parties to any of the four Geneva Conventions are obliged to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches . . ." There is no reason why mere seeking requires the exercise of criminal jurisdiction.

Nor do the Conventions otherwise require the exercise of criminal jurisdiction. They allow for an alternative at the discretion of the "searching" party. They provide that that party can either "bring such persons, regardless of their nationality, before its own courts" or "if it prefers[emphasis added] . . . hand such persons over for trial to another High Contracting Party concerned,

provided such High Contracting Party has made out a *prima facie* case."

This language can be construed to require a trial, but it can more coherently be construed not to require a trial. It is plainly self-contradictory. What happens if no other "High Contracting Party concerned" is interested in receiving the accused, or has not made out a *prima facie* case? Does "alleged to have committed" or "ordered" a grave breach involve making out a *prima facie* case on the part of the Party searching for the alleged grave breacher? What happens to the accused if nobody wants to try him or her? Indeed, there are many weaknesses in the language of the 1949 Geneva Conventions, and great care ought to be exercised before any particular interpretation is accepted as definitive. See GEOFFREY BEST, *WAR AND LAW SINCE 1945* (Oxford: Clarendon Press 1994) *passim*. Best attributes one oddity in the grave breaches provision, a reference to wilful killing, torture or inhuman treatment to "property," to a reported incident of an influential member of the drafting committee "wanting his lunch and not allowing the drafting committee enough time" (p. 165 n. 84). It is significant to interpreting the language that no High Contracting Party has yet construed its obligation to require it to bring the accused to trial itself, and the Conventions have now been in effect for 45 years of war and atrocity.

In order to exercise criminal jurisdiction, it is not only necessary that a prescription exist that can be applied by an American tribunal, but also that there be "jurisdiction to adjudicate." REST. 3RD., RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 421-423. In my opinion the Restaters' remarks regarding "piracy" and other assertedly "universal" offenses in § 404 Reporters' Notes 1 and § 423 are not supported by precedent or logic. As to "piracy," see ALFRED P. RUBIN, THE LAW OF PIRACY, 63 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES (1988) ch. III, esp. pp. 144-146, 303-304; *Historical and Revision Note* in 18 U.S.C. Ch. 81. Their opinions expressed with regard to §§ 421-422 seem to me to be adequately supported. In the 45 years or so that the Conventions have been in force there has not been a single case in which any state has interpreted the Conventions to require it to exercise its own criminal jurisdiction over a foreigner accused of committing a "grave breach" in a conflict in which the "seeking" state was not involved; i.e., did not have jurisdiction to adjudicate. Nor have there been any allegations by a state "concerned" that construe this language to oblige any other state to render more cooperation that would be required by the usual extradition processes or similar assistance in transnational criminal matters. It is very difficult now to understand the basis for a State Department interpretation of the Geneva Conventions to require action that no party to the Conventions has construed from the words of the Conventions.



The refusal of states to accept such obligations has ancient roots and is well-founded in the structure of the international legal order. For at least seven centuries national "prize courts" have applied to maritime ventures what many scholars have called the international laws of war. Attempts to create an international prize court have failed. The reason is that states have been construed to be responsible for the activities of their licensed mariners and soldiers; failures of states to control their agents has involved state responsibility and occasionally compensation has been paid even to enemy belligerents in time of war. See the *Awa Maru* incident, U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS, 1944-45, 125-138 (1946); ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA (50 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES 1955) (1957) note 16 at pp. 98-99. The idea that a third party under any circumstances should be in a position to de-commission a warship or "decapitate" a Navy by arresting an Admiral or civilian "Commander-in-Chief" has been regarded as inconsistent with the existing legal order. War is not a game overseen by neutral umpires; it is a contention among states in which atrocities are committed by some licensees on both sides and children get killed. The failures of some belligerents to abide by their legal commitments are not remedied by the interposition of third-party umpires; they are influential in undermining the morale of the defaulting state, discouraging its allies, stiffening the resolve of adversaries, justifying "reprisals," and, in effect, triggering the community pressures that encourage states

to obey the law. See *Ford v. Surget*, 97 U.S. 594 (1878). An analogy can be drawn to the means by which American Constitutional Law is enforced by political and other pressures rather than by police or direct judicial interposition.

In the Genocide Convention of 1948, jurisdiction to adjudicate was specifically restricted to the tribunals of the state "in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" (Article 6). There is no provision for universal jurisdiction to match the notion of universal offense. Now, if the Geneva Conventions had been more clearly drafted, it would be possible to argue that they superseded the reluctance expressed in the Genocide Convention concluded about eight months earlier to have universal policing deter atrocities. But the Geneva Conventions' grave breaches provisions are notoriously badly drafted, evidencing enthusiasm more than deliberation. In the circumstances, there seems to be no reason to suppose United States obligations under the Geneva Conventions extend to such a radical step as a major revision of the underlying rules of the international legal order restricting jurisdiction to adjudicate. Or is it argued that Genocide is less of an atrocity than a grave breach of the 1949 Conventions?

And nothing has changed this basic orientation. Not even the Nuremberg and Tokyo trials, which, although in my opinion morally and politically necessary and preceded the Geneva Conventions by

three years, were victors' tribunals whose procedures were questionable and whose procedural precedents have not been followed for fifty years of war and atrocity.

The effect of this State Department proposal would be to inject the United States into disputes among others in which the United States should play no role. Its effects would be unpredictable and certainly not in the interests of the United States. What, for example, would be the position under this proposal of an accused who had been "pardoned" by the state or belligerent leadership with the legal authority to represent the victims of the supposed atrocities? Pardoned by his own state or belligerent leadership? Pardoned in an exchange of pardons negotiated to end the conflict? Is it the position of the Department of State that the Geneva Conventions or the general international laws of war require the punishment of war criminals regardless of the political circumstances in which mutual claims for "war crimes" have been waived by the belligerents, as the United States and Japan waived their mutual claims at the close of the Second World War (much to the dismay of those who would like to have regarded the dropping of nuclear weapons on Japan as a "war crime" for which the United States owed Japan compensation and individual American leaders should have been tried). See *Ryuichi Shimoda et al. v. The State*, reprinted in English translation in *THE JAPANESE ANNUAL OF INTERNATIONAL LAW* FOR 1964, 212-252 (1964); RICHARD A. FALK, *THE SHIMODA CASE: A LEGAL APPRAISAL OF THE ATOMIC ATTACKS UPON HIROSHIMA AND NAGASAKI*, 59 *AM. J. OF INT'L L.* 759-793

Iran can exercise. Now, the State Department proposal distinguishes between jurisdiction to prescribe, which is usually regarded as universal when "war crimes" are concerned, and jurisdiction to enforce (the State Department proposal would apply only to accused foreigners found within the territory of the United States). But under the American Constitution, a bad capture does not deprive a tribunal of criminal jurisdiction: *Male captus, bene detentus*. See *U.S. v. Alvarez-Machain*, 31 INT'L LEGAL MATERIALS 900 (1992). Is it supposed that there would not be attempts to kidnap a foreign villain if a trial in the United States might satisfy somebody's urge to upset a foreign peace accord? Suppose a fanatic group were to kidnap Yasir Arafat or Yitzhak Shamir and bring him to the United States for trial as a war criminal as Israel kidnapped Adolph Eichmann in Argentina and brought him to Israel for trial? Or if Libya, which was at one time reported to have send "hit squads" to the United States to apply Libyan law to Libyan students here, were to do the same as we, asserting the Libyan interpretation of the international laws of war to be validly applied to people the Libyans accused of committing atrocities in Libya. Those Americans who ordered a bombing raid in Tripoli? Or committing atrocities elsewhere in the Middle East? Or anywhere?

Now, I doubt that any of these things would happen, because the United States would move to enforce its view of law by military, economic, political and other means. But what, then, happens to the sanctity of law? To the sovereign equality of states?

As to the State Department proposal to extend the criminal jurisdiction of the United States beyond the terms of the Geneva Conventions to "war crimes" and violations of the provisions of Article 3 common to the four conventions -- i.e., civil wars, again I find myself in reluctant opposition. The language regarding "grave breaches" was negotiated specifically to avoid extending jurisdiction to "war crimes," violations of the laws and customs of war. The reason is that the Annex to the 1907 Hague Convention respecting the Laws and Customs of War on Land, attempting to translate major parts of the general international laws of war into positive law, included in the violations such venial acts as taking private property without giving a receipt (Article 52). The State Department seeks to avoid this problem by specifying that only four articles of the Annex to the 1907 Hague Convention should be read to define "war crimes" to which American jurisdiction to adjudicate should be extended. But those four themselves are overbroad and not fit for such use. For example, one of them is Article 23. Now, Article 23(g) makes it a war crime "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Who is to judge how imperative a necessity of war was; to second-guess the evaluation of a General ordering the bombing of what turned out to be a civilian bomb-shelter, or the destruction of a civilian dwelling believed to shield a small-arms cache? If it is supposed to leave such specifications to later cases and judicial refinement, bearing in mind

that criminal penalties are involved, not tort or contract payments, it would seem that "common law crimes" are to be resuscitated. Assuming the accused had been on the "winning" side, would there not be a protest from the foreign country of which the accused is a national? Is it proposed that the United States respond to such a protest by asserting universal adjudicatory authority, the legal power to oversee the "legitimacy" of some foreign succession by requiring revolutions to be fought by our version of the "book," that book not yet having been written? Has Metternich revived to take over our Government? Or do we fancy our courts to be composed of "Guardians" in the sense of Plato's REPUBLIC ruling the world. Do we select them and approve their appointment with that in mind?

Finally, to the State Department proposal to implement the as-yet-unratified Protocol to the Conventional Weapons Convention, all the preceding comments seem to apply, compelling opposition. Moreover, the wording of the State Department proposal seems odd; it apparently intends to refer to the United States accepting the latest amendment but seems to refer to the United States accepting a document it has already accepted. If acceptance of the Amendment of 1996 is intended, as I imagine, the question of the reach of American criminal jurisdiction with regard to people violating the Protocol should be dealt with when acceptance of the Protocol is discussed. At that time, the views expressed with regard to the structure of the international legal order, the role of law in

H.R. 2587 Testimony/Rubin - 14 -

attempting to control some of the baser instincts of mankind, should be more fully discussed, along with the role of the United States, as only one component of the international legal and political order, should be considered. Until that happens, with great regret I must oppose the proposals of the Department of State.

Excerpt from ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW (now in publication process at the Cambridge University Press)

In fact, the positive legal order does not require people or states morally revolted by the actions of others to stand helpless. There are ameliorations to such horrors in the existing international legal order which are being overlooked by those whose moralist-moralist model has seemed to become an obsession.

The simplest is merely to apply the positive law codified in the 1949 Geneva Conventions<sup>1</sup> to all struggles for authority that turn violent. Those four Conventions are very widely ratified and, despite many unclarities and inconsistencies in them, are usually regarded as definitive formulations of the substantive law binding as a matter of general practice accepted as law even if not expressly accepted by formal ratification. Since they are so widely ratified, the question has been treated as one of positive law, and the relationship of the rules stated in the Conventions to general international law has only rarely arisen. The Conventions take a "dualist" view of the international legal order, obliging parties to the conflict to take action against individual violators of the substantive rules, but leave open the possibility that an international tribunal might yet be established to exercise adjudicatory functions.<sup>2</sup> Whether the tribunal established by the Security Council to adjudicate alleged war crimes and human rights violations in former Yugoslavia represents a definitive shift to a "moralist" legal order for purposes in enforcing "international criminal law" remains to be seen. It certainly represents an attempt in that direction, but the complications, reinterpretations of treaties and exceptions raise conceptual problems that are probably



insuperable to those who are aware of Occam's Razor.

Under the "positive law of armed conflict," persons accused of "grave breaches" of any of the 1949 Conventions, including wanton murder, must be sought out, then tried or handed over for trial to another party concerned in the struggle. It would mean, in the case of former Yugoslavia, that a person accused of killing or ordering a killing outside the privilege of soldiers to kill the resisting enemy could be handed over to either his own command with a public commitment to apply the rules to which Yugoslavia was bound by treaty and its successor states by the normal law of state succession, if not by general international law developed by the practice of states accepted as law in diplomatic correspondence and other actions, and codified by the Conventions. If that "solution" is not trusted to do what the initial captor considers "justice," the accused could properly be handed over to the opposing side for trial and punishment under international safeguards set out in the Conventions, including the appointment of a "Protecting Power" and the presence of impartial observers at the trial.

Nor is it a valid criticism of this positivist approach that the fanaticism that accompanies armed struggle would make a trial by either of the participants inherently unfair. Equivalent emotions and ambitions to alter the international legal order to the benefit of lawyers and the detriment of national leaders also cloud proposals by both positivist and naturalist scholars to establish an international criminal court. The reasons why British proposals

along that line were rejected by the United States in the mid-nineteenth century have been sufficiently discussed above. There does not appear to be any attempt to respond to those objections by advocates of an international criminal court today. Instead, discussions seem to proceed on the assumption that the officials of enlightened states would not commit such acts (which is patently unbelievable) or that the legal orders of those enlightened states would deal with those problems as they arise wholly within their own municipal orders; that the traditional distribution of authority will serve for us, but not for them, so we should impose our tribunals on them, but do not need to alter the system as it might apply to us. This approach obviously rejects the fundamental notion of sovereign equality of states. It is unlikely to be accepted for long by those societies whose people demand the same respect that our own friends demand. And it is no answer to them that they are wrong in their value systems or administration of "justice," and we are right.

Instead, there seems to be a growing movement on the part of a number of states to reject international supervision of their political order and punishment of those responsible for recent abominations. Their leaders see the futility of "criminal" penalties under their own municipal orders when reconciliation, peace and an evolution towards democracy is their aim. Those societies have chosen to abandon the positive remedies of an inappropriate criminal law model, even if confined to their own municipal order.

Instead, several have institutionalized a virtue-moral solution: "Truth tribunals." Under that pattern, confessions and exposure of atrocities are placed in the public record for history to know and, in return, criminal penalties are waived. If public opprobrium makes life difficult for those confessing to having committed atrocities to achieve what they had conceived to be the public good, the moral sanctions are working to punish present fanatics and deter future ones. Such punishment is not likely to be less severe than internment together with others who feel not that they have done wrong, but that they have lost a mere struggle for authority.

If there is no sense of public opprobrium that attaches to those who confess the truth, then it is likely either that the past has been "cleansed," that the public has matured as its political order has matured, or that the evils of the past still permeate the society and criminal sanctions would have been regarded as mere political suppression anyhow.<sup>1</sup>

In practice, "truth" tribunals making amnesty conditional on confession seem to be more effective in the search for peace and reconciliation than positive law tribunals would be attempting to apply retributive justice. Examples of such tribunals can be found in Argentina, Chile and South Africa. In all those places there is opposition based on the sense that the books cannot be closed on a horrid chapter in national history unless retributive justice is done. Accepting that for many, that will remain true, it is also true that for many others peace and reconciliation, accepting the

evils of the past as beyond effective remedy, but truth being essential to a better future, are regarded as the more compelling values.

Reasonable people will surely continue to disagree as to the relative moral values of "justice" and "peace." An example of this conflict occurred in the United States when Lieutenant Calley was tried and convicted by a United States Court Martial for the breaches of military discipline committed when he committed undoubted atrocities in Viet Nam. He was pardoned by President Nixon when it became clear that Calley in peacetime was no danger to anybody and that a significant part of the American populace felt that atrocities committed against an "enemy" in "war" (even though "war had not been declared; but it was universally agreed that the international laws of war applied in that place at that time) did not justify significant punishment regardless of American commitments to various conventions that seemed applicable.<sup>4</sup>

Another "solution" would be consciously to separate "legal" from "moral" condemnation, treat adjudication by a third party as simply not an option that the legal order permits, but to apply moral sanctions to the villains, including the leaders of the force considered to deserve such sanctions and those who control the legal orders that have not discharged their moral, perhaps even positive legal, obligations to prevent or punish "grave breaches" of the 1949 Geneva Conventions and other "war crimes." Moral sanctions applied to states or belligerent parties to a conflict even

if not "states," and to the individual nations, would include such things as refusing to establish diplomatic relations, issue visas or invite the accused individuals to participate in conferences of interest to them or their constituents. Kurt Waldheim, at one time Secretary-General of the United Nations, later Chancellor of the state of Austria, faced such opprobrium as a result of the exposure of his past. Since entry into a foreign country is not a legal right, there is no violation of the law in refusing to facilitate it. Such moral sanctions applied to states did have an effect in convincing the people of South Africa that a public policy of "apartheid" was not acceptable in a business partner. The pressures of moral sanctions are not quick and not sure, but they do express the revulsion that is felt by those applying them towards those accused of atrocities or lax enforcement of the law that condemns atrocities, and are as likely to have an effect as any other actions that do not reach the level of direct involvement in the foreign struggle.

A third approach would be to develop Joseph Story's choice of law approach better to fit the current needs of the existing legal order. According to dicta of Chief Justice Marshall in *The Antelope*, "The courts of no country execute the penal laws of another."<sup>5</sup> Whatever the validity of this assertion as a rule of law, it is certainly a recognition of the complexities of the international legal order. A court, being the creation of a municipal legal order, is usually authorized to "execute" the penal laws only of

the legislator who established the court. Why should the public purse of the establishing order pay for the enforcement of "laws" that its own public authority had only an attenuated voice or even no voice in making and that lie beyond the legal powers of its own ameliorating authorities, such as those empowered to grant amnesty? But are the criminal laws of the international legal order, if there are any, the penal laws of another "country"? Rather than attempt to analyze further the conceptions of Chief Justice Marshall and the apparently unanimous American Supreme Court in the *Antelope*, the working out of Joseph Story's conception of choice of law has pointed the way to a simple solution. Why should a legal order not make criminal by its own law the violation of some chosen foreign law, whether municipal or international (if there is any such thing as "international criminal law")?

Doctrinal complexities arise which seem insuperable when publicists or legislators attempt to ground state authorities' cooperation with the authorities of other states in criminal law enforcement on theories of natural law and perceptions of positive law that bear little relationship to the actual distribution of authority in the international legal order.<sup>6</sup> Rarely is it more desirable to remind scholars of the utility of Occam's Razor. But those complexities disappear when the requested state extends its own prescriptions on the basis of nationality or, in some cases, "effects" to cover the situation. In fact, at least one country, Germany, does effectively extend its jurisdiction to adjudicate in

criminal matters to its own nationals violating foreign criminal law abroad when the same act would have been criminal under German law had it been committed within German territory. This extension of Germany's assertion of jurisdiction to adjudicate was apparently inspired to ameliorate the consequences of Germany's legal prohibition against extraditing its own nationals for acts done within the prescriptive jurisdiction of a foreign legal order and denominated crimes by both legal orders concerned in extradition proceedings, but the open rationale goes much further.<sup>7</sup> As to the exercise of German jurisdiction over German nationals committing crimes against foreign law only, the crime against the foreign law becomes a crime against German law and can be tried, and pardoned, as such.<sup>8</sup> Since international law already accepts the notion that a state's prescriptive jurisdiction in criminal matters can extend to the acts of its nationals wherever the acts are actually committed,<sup>9</sup> and the jurisdiction to enforce is satisfied by the physical presence of the defendant in German territory, it seems a minor matter to extend the jurisdiction to adjudicate in criminal matters to cover the acts of the forum state's nationals abroad. If failure to exercise that jurisdiction would leave the requested state in breach of an extradition treaty, or in a position as potential asylum state for its own nationals who perform acts which are criminal by both its own municipal law and the municipal law of the place where those acts were actually performed or have effects, bringing them into the prescriptive jurisdiction of the requesting state,

state, the failure to punish the national could well be interpreted to be a violation of at least the sociological "natural law" posited by Aristotle. The resulting strain in diplomatic relations, so easily avoidable by an exercise of jurisdiction to adjudicate, would seem unnecessary and a sound policy argument seems clear to encourage all states in the international order to follow Germany's lead in this regard.

As to applying German versions of a foreign criminal prescription to the acts of a foreigner against other foreigners abroad, it is very hard to see how the law can be justified. Not only are traditional lines of authority relating to jurisdiction to adjudicate ignored, but human rights implications seem obvious. Under whose public policy is a plea-bargain or pardon to be entertained? How can the accused subpoena his or her defense witnesses or physical evidence? Like it or not, territorial boundaries still determine the limits to the authority of a tribunal to issue binding orders and punish by contempt proceedings those who ignore or disobey them. At least some of these problems might be ameliorated if the rules were translated to positive law, perhaps treaties by which states undertook to cooperate with each other in criminal prosecutions that disregard jurisdiction to adjudicate. But there does not as yet seem to be a groundwork laid that would solve those problems. To put it most kindly, the German legislation is complex and not all observers would agree that the German perception of



municipal jurisdiction to adjudicate is consistent with the simplest model of the international legal order or that Germany would feel comfortable itself if its model were applied by its neighbors; a practice under which those neighbors would provide their own municipal criminal penalties for persons accused of violating German criminal law within German prescriptive jurisdiction and not within what would be their own in the absence of a political decision not to extradite or deport the accused.

The arguments in favor of extending a state's jurisdiction to adjudicate to the acts of nationals, or even of foreigners, abroad seem even clearer in cases in which an accused has committed atrocities such as grave breaches of the 1949 Geneva Conventions, or acts, usually called "terrorism," which would be "grave breaches" except for a refusal by the political organs of the forum state, on policy grounds, to apply the legal labels that might imply recognition of a "belligerency."

By this rationale, a person accused of violating a law of war, which all parties to the 1949 Geneva Conventions have legally obliged themselves to make criminal in their own law, "when not "handed over" by reason of the lack of a tribunal or fair trial safeguards that meet human rights standards or the standards of the Conventions, could be tried by any state that has the normal jurisdiction to adjudicate, perhaps based on the nationality of a victim. The state running the fair trial with international observers

according to the terms of the 1948 Conventions would not be enforcing substantive "international law" as an interloper, but its own municipal criminal prescription which, by treaty, should be more or less identical with the prescription of the defaulting state. In effect, it would be doing for a defaulting state what that defaulting state has a legal obligation to do. It would derive its jurisdiction to adjudicate from the legal detriment it suffers through the nationality of a victim or an effect in its territory, from the injury done to it by the default of another contributing to that injury by failing to perform its own duty of handing over the accused for trial as envisaged in the Conventions. The rationale is "rectification."<sup>12</sup> In fact, the International Law Commission, a body of learned publicists formed to advise the United Nations General Assembly concerning areas in which the rules of international law could be usefully codified, as this is written seems to be moving in that direction.<sup>13</sup>

"International terrorism" has provoked substantial international concern and monist-naturalist actions that seem far less effective than a dualist-positivist approach would be. At this writing, in actual practice two states, the United States and Germany, have gone so far as to ignore the normal requirement for *jus standi*, the legal interest necessary to establish jurisdiction to adjudicate. They seem to consider "terrorism," as defined by themselves and as performed by persons whom no state appears willing to protect or to discharge against them the obligations incumbent upon

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parties to the 1949 Geneva Conventions, to be a matter for universal jurisdiction not only to prescribe, but also to adjudicate.<sup>14</sup> Parenthetically, it might be observed that the rationale used to support assertions of universal jurisdiction to adjudicate in those cases seems much broader than would seem warranted by the facts or a model of the legal order that conforms to the traditions of the Westphalian "constitution"; would seem thus to violate Occam's Razor.

There seem to be no cases applying national versions of the hypothesized international criminal law to the acts of a foreigner against strictly foreign interests abroad other than two "terrorism" cases in which the accused were in the position of Klintock in the leading American case asserting jurisdiction over the acts of the foreigner against foreign interests abroad, professing allegiance to no legal order (i.e., belligerent or government) recognized by the state seeking to expand its adjudicatory authority.<sup>15</sup> The two cases arising recently involved Arab "terrorists" of either no reliably asserted nationality or no state willing to press diplomatic correspondence to protect them. The two cases are the conviction of Mohammed Hamadei by a German tribunal and the conviction by a United States tribunal of Fawaz Yunis.<sup>16</sup>

To say that this abstention from engaging in diplomatic correspondence was evidence in a conviction that the law would not support the argument that the prosecuting state lacked *jus standi* is far more than the political realities would seem to bear. The European and American outcry at Iran's fatwa condemning Salman Rushdie for violating Iran's version of divine law while the secular law of the current international legal order would categorize Rushdie as a foreigner outside of Iran and doing no sufficiently direct injury within Iran seems strong evidence the other way. And yet, the push to extend at least adjudicatory and enforcement jurisdiction seems well underway as this is written. Article 6 of the German Penal Code asserts the applicability of German criminal law to a list of actions "affecting internationally protected interests [*Auslandstaten gegen international geschützte Rechtsgüter*]" such as genocide, crimes involving nuclear energy or explosives, attacks on air and sea traffic, slave trade, narcotics dealing, diffusion of pornography, counterfeiting and a few other things; and article 7 expanding the applicability of German penal law to acts of foreigners outside of Germany where the territorial law forbidding those acts is not enforced and the victim is a German national, or where the foreign jurisdiction should be applied but extradition is not feasible ("*die Auslieferung nicht ausführbar ist*").<sup>17</sup>

Signalling a possible future direction in which the urge to punish foreigners committing atrocities against other foreigners

seems to have been subordinated to the more traditional use of municipal criminal law to protect the public order of the particular state enacting and enforcing that law, Belgium has a much more limited statute. First, it nods in the direction of international cooperation to help suppress the commission of war crimes; "grave breaches" of the 1949 Geneva Conventions and their 1977 Protocols. Its Law of 16 June 1993 asserts for Belgian tribunals whatever jurisdiction is necessary to implement the penal provisions of the 1949 Geneva Conventions and their 1977 Protocols. In light of a number of serious problems in interpreting those provisions,<sup>18</sup> it is very difficult to say just what the effect of this law might be in practice; no cases are known to have been brought under them. But much clearer is the Belgian Law of 13 April 1995. Article 8 provides for criminal jurisdiction over a foreigner found in Belgium (thus within Belgian jurisdiction to enforce) who has committed any of the listed offenses outside of Belgium. But all of the offenses listed involve pornography, sexual or similar moral delicts involving minors under 16 years of age.<sup>19</sup> Since the accused must have been found in Belgium, it appears that extradition to Belgium is not envisaged, although, again, a definitive interpretation of the statute must await actual practice under it. It can certainly be argued that the Belgian approach assumes a distinction among jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. It remains to be seen whether those traditional distinctions will be maintained in light of the

general wording of the statutes, their intended effect, and the increased flow of people across European borders.

A fourth course of action consistent with the current international system is in fact inaction. Do nothing. This is the course most likely in fact to be taken once the problems of national tribunals exercising a purported universal jurisdiction to adjudicate have become clearer, and the enthusiasm for international criminal tribunals has died down, as seems likely if they fail to reduce the horrors occurring in former Yugoslavia, Rwanda, and elsewhere and today's tribunals' advocates begin to speak more of "useful precedents" than of immediate effects. This has in fact been the fate of the "Nuremberg precedent." Volumes have been filled with analyses of the illogic of trying some of the accused for "conspiring to wage aggressive war" when representatives of their partners in the conspiracy were sitting at the prosecution table and on the bench.<sup>20</sup> The first attempt to apply the precedent to another defeated enemy, Japan, provoked a persuasive formal dissent from one of the judges, a partial dissent from another and a rather confusing concurrence from a third. The Nuremberg and Tokyo "precedents" have then not been repeated in a legal proceeding for fifty years. It surely cannot be argued that during that period there were no "aggressions" or unprosecuted "war crimes" or "crimes against humanity" as those phrases were defined for purposes of the Nuremberg and Tokyo tribunals.

In my opinion, the use of the forms of law to achieve a necessary political aim regardless of legal principle and consistency has demeaned the law more than it has strengthened it. But in some cases, as at Nuremberg, it has also achieved its political and some moral purposes, so perhaps was the best course available to the victors. In my opinion, the problem is not with using the forms of law to expose the horrors of an unspeakable episode in human history, but with attempting to use those forms to justify redistributing authority in the international legal order without considering the full range of consequences: Precisely *who* should have the authority to order *whom* to justify his or her acts before *whom*, and *who* selects the judges, the "guardians"? Meanwhile, for the international community to do nothing about such moral horrors as the likely genocide in Rwanda and the probable violations of the laws of war in former Yugoslavia seems to be a true reflection of the international legal order in its usual practice. That practice is probably dictated by the unwritten constitutional law of a society of separate legal orders, states, and no universal authority; a "horizontal" legal order.<sup>31</sup> The practice is to confine the horrors to the territory controlled by rogues and encourage the escape of potential victims. Those who cannot escape, like Jews and Gypsies in territory under Nazi control or Cambodians in territory controlled by Pol Pot's villains, are likely to be killed or worse. But those who escape that territory face only the more civilized horrors of starting life afresh, if they can. And there is no legal

obligation on a potential asylum state actually to offer asylum.

This is the approach in fact normally taken by municipal law when confronted with analogous horrors. One obvious example is child abuse. The child escaping his or her abusive family is welcomed (or not) by a neighbor, and the abusive parent cannot invade the neighbor's house without other consequences that in fact involve community reactions. Meantime, the community response to the abusive situation itself is notoriously dubious. Few trust social case-workers to make the decisions that could finally break up even a dysfunctional family, and other community organs normally will not step in until it is too late to help. The evils of being too late are normally regarded as less than the evils of acting too quickly in light of the other interests involved in a family situation. So the abuse is confined to that family, and the moral indignation of the neighbors is the only effective social response the system cannot stop. So in international affairs, the genocide is confined by the system to the territory which the villains control, and the neighbors look on aghast but legally powerless to help. Those that feel that moral sanctions are appropriate can apply them.

There is nothing wrong with that system except in the minds of those who feel secure enough in their own moral insight and perception of facts to try to govern the lives (and deaths) of others. From a strictly personal point of view, I would not trust anybody from outside the circle of those immediately involved who



asserted with certainty to make these decisions for me or my family or my country. To those who would argue that the evils of genocide can be apparent, and the moral obligation to stop it so compelling that the use of third-party force is legally as well as morally justifiable in response, the legal system poses two answers. First, the notion that moral conviction by an outsider justifies the use of force by that outsider is an open invitation to chaos: rule by the strongest outsider with the most persuasive demagogues, and scrapping the fundamental rule of sovereign equality of states. In some cases the human benefits might be worth the cost to the system, but there is a strong possibility that the moralist is fallible in his or her appreciation of the facts or the moral issues, and the cost to the system should be measured before anybody should be persuaded to act on the basis of strong moral pressures. Second, as pointed out above, the alternative response of the legal order is not negligible. Admitting into one's own protective system those fleeing the horrors of a neighboring country, as was not generally done in the case of German persecution of Jews in the mid-20th century, is a legal response both cheaper in lives and property than war, and more effective than war if humanitarian concerns are really the dominant issues in the minds of those counseling action.

## NOTES

1. The four Conventions for the Protection of the Victims of Armed Conflict adopted at Geneva on 12 August 1949 have been ratified by nearly all states members of the international community and are widely published. 75 UNTS 31-417 (Reservations are on p. 419-468); 157 Br. For. & St. Papers 234-423. I have used the version in DIETRICH SCHINDLER AND JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* (3rd revised and completed ed.) (Geneva: Henry Dunant Institute 1988) 373-562 (Reservations are on pp. 563-594). Two Protocols to the Geneva Conventions were adopted on 10 June 1977 (Schindler & Toman 605-718), but have not yet been ratified by several major Parties to the Conventions. Among the non-ratifying states are the United Kingdom, the United States and Russia.
2. For an analysis colored by the discussions taking place in the United States during the Viet Nam "war," see Rubin, *Rebels*.
3. MICHAEL SCHARF, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31(1) TEXAS INTERNATIONAL LAW JOURNAL 1 (1996), argues that state practice does not support the existence of a legal "rule" requiring prosecution of crimes and suggests that the United Nations make such a rule by opposing unconditional amnesty as a matter of political and moral principle (pp. 40-41), although "truth" tribunals, making amnesty conditional on confession and

cooperation in exposing the truth, would be permissible.

4. See ALFRED P. RUBIN, *Legal Aspects of the My Lai Incident*, 49 (3) OREGON LAW REVIEW 260-272 (1970), reprinted in B. R.A. FALK, ED., *VIETNAM AND INTERNATIONAL LAW* (Princeton, 1972) 346-358.
5. *The Antelope*, cited note 220 *supra* at p. 123. See also Janis, *op.cit.* note 290 *supra*. By referring to the arguments of counsel in *The Antelope*, Janis concludes, as do I on the basis of this review of the evolution of jurisprudential postulates, that Chief Justice Marshall and the Supreme Court were taking a clear and general "positivist" and "dualist" line, not seeking to carve out a narrow exception to a "naturalist" or communitarian general rule of universal assistance in criminal matters relating to offenses which a foreign sovereign had the power to pardon.
6. See ISTVAN SZASZY, *Conflict-of-Laws Rules in International Criminal Law and Municipal Criminal Law in Western and Socialist Countries*, in 2 M. CHERIF BASSIOUNI & VED NANDA, eds., *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (1973) 135, esp. pp. 159-168.
7. See the German Constitution (*Verfassungsrecht*) Article 16(2): "Kein Deutscher darf an das Ausland ausgeliefert werden [No German may be extradited to another country]."
8. For an outline of the German legal framework, see Kennedy, Stein & Rubin, *Hamadei*, at 12-20 (by Professor Dr. Torsten Stein).

9. The Lotus Case (1928) (France v. Turkey), P.C.I.J. Ser. A, No. 10, esp. dissent by John Bassett Moore.
10. FINAL REPORT OF THE INTERNATIONAL LAW ASSOCIATION COMMITTEE ON LEGAL PROBLEMS OF EXTRADITION IN RELATION TO TERRORIST OFFENCES, Warsaw, 1988. The full Proceedings including the Report and the debate that led to its adoption by the Association are printed in 11 TERRORISM; AN INTERNATIONAL JOURNAL, 511-529 (1989). See also ALFRED P. RUBIN, *Terrorism and the Laws of War*, 12 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 219-25 (1983). The first proposal along this line appears to have been made by the *Institut de Droit International* in 1880.
11. Each of the four Geneva Conventions of 12 August 1949 (cited at note 1 *supra*) requires the states parties to try or "hand . . . over for trial to another High Contracting Party concerned," persons accused of a "grave breach" specified but not clearly defined in parallel articles of each of the four conventions. The list of "grave breaches" is expanded but not clarified in two Protocols concluded in 1977. It is not universally agreed that ratifying the Protocols would lead to greater respect for international humanitarian law or the moral convictions on which it is based. See ALFRED P. RUBIN, *Is the Law of War Really Law?*, (Review article of GEOFFREY BEST, *WAR AND LAW SINCE 1945*, 1994), 17(2) MICH. J. OF INT'L L. ? (1996). And see exchanges between Ambassador George H. Aldrich and Alfred P. Rubin in 85(4) AM. J. OF INT'L L. 662-663

- (1991); Editorial Comment by Professor Theodor Meron in 88 AM. J. OF INT'L L. 678 (1994) and Responding Correspondence by Alfred P. Rubin in 89(2) AM. J. OF INT'L L. 363-364 (1995).
12. See JEFFREY SHEEHAN, *The Entebbe Raid: The Principle of Self-Help in International Law* (Justification for State Use of Armed Force, 1(2) THE FLETCHER FORUM OF WORLD AFFAIRS 135 (1977) at 144-146. This conception has not yet been evidenced in diplomatic correspondence or state practice; nor has it been rejected. It has been ignored. It is suggested here, that the rationale should become increasingly persuasive to those wishing to find a basis consistent with the current international legal order for international action to ameliorate the horrors perpetrated in former Yugoslavia, Rwanda and other places too depressing to list.
13. On the origin of the International Law Commission and its relationship to the United Nations General Assembly, see GOODRICH, HAMBRO AND SIMONS, *THE CHARTER OF THE UNITED NATIONS* (3rd and rev'd ed. 1969) 137. The ILC draft of 16 July 1993 as reproduced in 33 I.L.M. 253 (1994), article 24 restricts the jurisdiction of the proposed international criminal court to those cases "accepted" by states "which have jurisdiction [to try the suspect . . . before its own courts] under the relevant treaty" defining the crime, plus "genocide" as defined in the Genocide Convention of 1948. This raises very complex questions of treaty interpretation, and the draft has not been

accepted. The ILC in its later work is reported to have adopted a rule that looks very like "rectification," although not using the term. It seems probable, although documentary evidence cannot be found, that the members of the ILC have independently come to the same conclusion as Sheehan.

14. Germany, for one. See Kennedy, Stein & Rubin, *Hamadei*, esp. pp. 27-35.
15. See U.S. v. Klintock, cited note 170 *supra*.
16. See Kennedy, Stein & Rubin, *Hamadei*.
17. I am indebted to Florian Thoma for the texts of the original German and a useful English translation.
18. For a critique of those provisions, and of the 1977 Protocols in general, see ALFRED P. RUBIN, *Is the Law of War Really Law?*, (Review article of GEOFFREY BEST, *WAR AND LAW SINCE 1945* (1994), 17(2? 3?) MICH. J. OF INT'L L. P.? (1996).
19. I am indebted to Professor Pierre d'Argent of the Centre Charles de Visscher pour le droit international, Université catholique de Louvain, for the French texts of these statutes.
20. See note 5 *supra*.
21. See GIDON GOTTLIEB, *The Nature of International Law: Toward a Second Concept of Law*, in 4 CYRIL BLACK AND RICHARD A. FALK, eds., *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* (1972) 331 sq.



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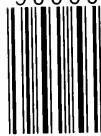




ISBN 0-16-053593-X



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